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Cases Reported.

Privy Council.

	M. L. J. PAGE
Adusumalli Surya Narayana v. Achuta Pottanna	585
Chaudri Risal Singh v. Balwant Singh	597
Choudhri Guru Narayan v. Sheo Lal Singh	68
Firm of Sadasuk Janki Das v. Sri Kishan Pershad Bahadur ...	429
Hukum Chand Boid v. Prithichand Lal Chowdhury	557
Joseph v. Shew Bux	151
Kanda Kuri Veera Basavaraju Pantulu v. Kanda Kure Balasurya Prasada Rao Pantulu	40
Maharaja of Jeypore v. Shri Rukmani Patta Mahadevi Garu ...	543
Mohant Paramananda Das Goswami v Kripasindhu Roy ...	18
Mussamat Afzul-un-nissa v Abdul Kareem	580
Musammat Jeuna Bahu v. Rai Parmeshwar Narayan Mahata Rai Bahadur	215
Nawab Nazir Begam v. Rao Raghunath Singh	521
Pratop Singh Shivsing v. Thakor Shri Agarsinghji Raisinghji ...	511
Rachappa Subrao Jadha Desai v. Shidappa Venkatarao Jadhav Desai	437
Raghubar Dayal v. The Bank of Upper India Ltd.	526
Raghunath Roy Marwari v. Rajah of Jheria	660
Raja Jagaveera Rama Venkateswara v. Alawarasa Asari	49
Raja Parthasaradhi Appa Row v. Raja Bommadevara Satyanarayana ...	279
Raja Rajeswara Dorai v. Sundara Pandiyasami Tevar	164
Raja Yerlagadda Mallikarjuna Prasad v. Rajulapati Somayya ...	257
Ram Narayan Singh v. Ram Saran Lal	344
Rangasami Gounden v. Nachiappa Gounden	493
Rani Kuar Mani Singh Mandhata v. Nawab of Murshidabad ...	210
Rathanlal Choonilal Panalal v. The Municipal Commissioner for the City of Bombay	1
Seth Ghunsham Das v. Uma Pershad	483

High Court—Full Bench.

Bathhu Ramajogayya v. Vajjula Jagannadham, ...	29
Chinnappan Chetty v. Secretary of State for India	124
Govinda Aiyar v Emperor	448
Kulesekhara Naiker v. Jagadambal Ammal	351
Muthirulandi Poosari v. Muthuandi Poosari	356
Muthuvelu Mudaliar v. Vythilinga Mudaliar	385
Padmanabha Hebbara *In re*	352
Periakaruppa Mukkandan v. Raja Rajeswara Sethupathi ...	320
Vaitheswara Aiyar v. Srinivasa Ragava Aiyanyar	296 (a)
Valan Pakkiri Taragan v. Subbayan Samban	79

Civil and Criminal.

	M. L. J. PAGE
Allapichai Rowthan v Pappathiammal	184
Ammalu Achi v. Ponnammal Achi	507
Anantha Bhatta v. Anantha Bhatta	92
Angia Kuppier v. Periakaruppa Kavundan	286
Arumugam Asari v. Gurunatha Asari	435
Arunachallam Chettiar v. Narayanan Chettiar	301
Asan Aliyar Mariakayar v. Masilamani Nadar	252
Bachu Soorayya v. Toomuloari China Anjanyeyalu	106
Bhashyakarlu Naidu v. Andalammal	89
Chinna Venkatasami Naicken v. Venkatasami Naicken	291
Dhulipalli Butchayya v. Kuppa Venkata Krishnayya	296 (g)
Hajee Mohamed Habibulla Badsha Sahib In re	60
Gopalasami Naik v Nammalwar Naick	175
Govindan Nayar v. Kunju Nayar	565
Gurusami Nadar v. Gopalasami Odayar	568
Jagannadhachariar v. Senu Bhattachariar	361
Jampana Somadu v. Sri Raja Venkata Ramayya	248
Kamatchinatha Pillai In re	101
Kamhala Narayan In re	452
Kandasami Pillai v. Ramasami Mannade	318
Kesava Chetty v. The Secretary of State for India	222
Komuru Appalaswami v. Palli Narayanaswami	62
Koyittal Parambil Parkum v. Attimana Illoth Narayanan Nambudri ...	295
Kozhikot Sri Manavedan v Zamorin of Calicut	103
Krishna Aiyar v. Savirimuthu Pillai	376
Krishna Chettiar v. Venkatachalla Chettiar	114
Krishnamurthi Aiyar v. The Taluq Board of Mayavaram ...	372
Krishna Shetti v. Gilbert Pinto	367
Krishnaswami Thathachariar v. Veeraswami Mudali	93
Kumarappa Chettiar v. Saminatha Chettiar	612
Kunhi Coya Haji v Assan Bava Haji	188
Mahbool Bi v Sherifa Bi	27
Mohideen Sahib v. Abbubukkar Sahib	122
Muhamad Abdul Gaffur Rowther v. Hamida Beevi Ammal ...	456
Muhamad Esuf Sahib v. Moulvi Abdul Sathar Sahib	263
The Municipal Council of Cocanada v. The Clan Line Steamers Ltd. ...	226
Nalluri Chenchiah In re	296 (o)
Nanikutti v. Achutan Kutti Nair	529
Nanjundasami Chetty v Kanagaraju	242
Narasimhayya v. Srinivasayya	118
The Official Assignee of Madras v. Mehta and Sons	190
Parameswara Iyer v. Land Acquisition Collector Palghat ...	95
Pathumma Umma v. Thittu Umma	159
Pakker v. Chandrankandi Kunhamad	231
Palita PavanaPanda v. Nasinga Panda,...	538
Ponniah Nadan v Devannia Ammal	463
The Pubilc Prosecutor v. Mahomed Sheriff Saheb	27
Raghunathaiyav. Saldana	161

	M. L. J. PAGE
The Rajah of Pittapuram v The Revenue Divisional Officer Cocanada ...	455
Rajaram Bhattar v. Singarammal	355
Ramachandra Aiyar v. Parameswaram Munbu	396
Ramachandra Row v. Ramachandra Row	307
Ramakrishna Naidu v. Krishnaswami Naidu	641
Ramalinga Chetty v. Siva Chidambara Chetty	575
Ramaswami Goundan v. Kali Goundan	571
Ramaswami Pillai v. Govindaswami Naicker	104
Sarvothama Row v. Chinnaswami Pillai	157
The Secretary of State for India v. Dadi Reddi Nagiah	180
The Secretary of State for India v. Raja of Ramnad	436
The Secretary of State for India v. Shitaramappa	207
Sethuramaswami Nayani Varu v. Syed Mir. Hussain Sahib ...	298
Sitha Boi v. Radha Boi	189
Sivaramalinga Dikshatar v. Sabharatna Dikshitar	624
Sri Rajah Rao Venkata Mahipati Gangadhara Rama Rao Bahadur Garu v. Sri Rajah Rao Venkata Kumara Mahipati Surya Rao Bhadur Garu.	169
Srinivasa Raghava Aiyangar v Ranganatha Aiyangar	618
Tiruvanatha Sevuga Pandia Tevar v. Sankaramoorthi Naidu ...	109
Vaidyalinga Mudaliar v. Srirangathanni	119
Varadarajulu Naidu *In re*	64
Vasudeva Kamath v. Lakshmi Narayana Row	453
Vatavatta Nair v. Kaenath Puthen Vithil Kuppassam Menon ...	630
Venkatachallapathi Aiyar v. Thawasi Servai	288
Venkatachariar v. Rangasami Aiyar	532
Venkatarama Sivan v. The Secretary of State for India	203
Venkatasami Naik v Sivanu Mudali	199
Yuna Ramanaya Kudu v. Boya Pedda Basappa	284

Table of Cases Cited.

A

A. G. v. Lord Churchill, (1841) 8 M and W 171, 192= 151 E. R. 997 ...	36
Abdul Kadar v. Mahomed, (1891) I. L. R. 15 M. 15	626
Abdul Khadar v. Meera Saheb, (1892) I. L. R 15 M. 224= 2 M L. J. 148.	448
Abhiram Goswami v. Shyam Charan Nandi, (1909) L. R. 36 I. A. at p. 167	667
Achuta v. Kali, (1884) I L R. 7 M. 454	92
The Administrator-General of Bengal v. The Land Acquisition Collector, (1905) 12 C W. N. 241	97
Ahinsa Bibi v. Abdul Kadar Saheb, (1901) I. L. R. 25 Mad. 26 ...	187
Aisa Siddika v. Bidhu Sekhar, (1912) 17 C. L. J. 30, 33.	626
Aiyakannu Pillai v. Emperor, (1908) I. L. R. 32 M. 49	358, 449
Aiyasami Aiyar v. The District Board of Tanjore, (1908) I.L. R. 31 M. 117	375
Aiyyagiri Venkataramayya v. Aiyyagiri Ramayya, (1902) I. L. R. 25 Mad. 690	246
Ajudhia Prasad v. Badarul Hussain, (1917) I. L R. 39 A. 489 ...	541
Akkil Chandra De v. Queen Empress, (1895) I. L. R 22 Cal. 1004 ...	449
Alaga iya Tiruchithambalam v. Saminatha Pillai, (1863) 1 M. H. C. R. 264	466

	M. L. J. PAGE.
Alagappa Chettiar *v.* Muthukumara Chettiar, (1917) I. L. R. 41 M. 316 ...	459
Ammalu Ammal *v*, Namagiri Ammal, (1916) 33 M. L. J. 631, ...	32
Ammani Amma *v.* Padmanabha Menon, (1918) I. L. R. 41 M. 1075=35 M. L. J. 509	567
Amolak Ram *v.* Lachmi Narain, (1896) I. L, R. 19 A. 174 ...	289
Andi Moopan *v.* Muthaveera Reddy, (1915) 29 M. L J. 91 ...	82, 88
Annappagauda *v.* Sangadigyappa, (1901) I. L. R. 26 Bom. 221 at 232 ...	35, 37
Annasami Pillai *v* Ramakrishna Mudaliar, (1900) I. L R 24. M. 219 ...	356
Appu Pillai *v.* Perumal Pillai, (1912) 23 M L. J. 118 ...	629
Archbishop of Canterbury *v.* Robertson, (1833) I Cr. and M. 690 ...	114
Archbishop of Canterbury *v.* Tappen, (1828), 8 B. and C. 151 ...	114
Arunachallam Chettiar *v.* Mangalam. (1915) 40 M. 540=31 M. L. J. 168	322
Arunachallam Chetty *v.* Syyad Ahamad Ambalam, (1915) 2 L. W. 1117 ...	324
Arunachalam Pillai, *v.* Appavu Pillai, (1866) 3. M. H C. R 188 ...	179
Arumugam Chetti *v.* Raja Jagaveera Rama Venkateswara Ettappa, (1904) I. L. R. 28 M. 444=15 M. L. J. 292	323
Atchutharaju *v.* Rajah V. G. Krishnayachandralu Varu, (1913) I. L. R. 38 M. 163	250
Ayderman Kutti *v.* Syed Aly (1912) I. L. R. 37 M. 514=23 M. L. J. 214 ..	185

B

Baba *v.* Tunia, (1883) I. L. R. 7 M. 357	579
Babu Singh *v.* Bihari Lal, (1908) I. L. R. 30 A. 156	297
Bachoo Harkisondas *v.* Mankorebai, (1907) L. R. 34 I. A. 107 ...	520
Bahadur Singh *v.* Mohar Singh, (1901) L. R 29 I. A. 1	504
Bairagulu *v.* Bapamma, (1892) I. L. R. 15 M. 302=2 M. L. J. 112 ...	384
Bajrangi Singh *v.* Manokarnika Baksh Singh, (1907) L. R. 35 I. A. 1 ...	499
Balakrishna Udayar *v.* Vasudeva Aiyar, (1917) I. L. R.40 M. 793 at 803= 33 M. L. J. 69	269
Balgaum Case, (1897) I L. R 20 M. 256	612
Bamundas Mukurjee *v.* Omeish Chunder, (1856) 6 M. I. A. 289 ...	296 (h)
Bamundoss Mukerjee *v.* Mussumat Tarini, (1858) 7 M. I. A. 169 ...	519
Banga Chandra Dhur Biswas *v.* Jagat Kishore Chowdhuri, (1916) L. R. 43 I. A. 249=31 M. L. J. 563	502
Bank of England *v.* Vagliano Brothers, (1891) A. C. 107	196
Barindra Kumar Ghose *v* Emperor, (1907) I. L. R. 37 C. 467 ...	66
Baroda Prasad Mostafi *v.* Gora Chand Mostafi, (1869) 3 Beng. L. R. 295...	81
Barrow *v.* Isaacs & Son, (1891) 1 Q. B. 417, 425	368
Baslingappa Pareppa *v.* Dharmappa Basappa (1910) I. L. R. 34 B. 571	82, 85, 86
In re Bedford's Charities (1819) 2 Swans 471=36 E. R. 696 ...	407
Behari Lal *v.* Madho Lal Ahir Gyawal, (1891) L R. 19 I A 30 ...	500
Best & Co., *v.* Deputy Collector of Madras, (1916) 20 M L. T. 388 ...	97 ; 98
Beti Maharani *v.* Collector of Etawah, (1872) I. L. R. 17 All. 198 ...	105
Bhakat Mal. Sahi *v.* Abdul Karim, (1916) 1 Pat. L J. 86	297
Bhoobun Moyee's Case, (1865) 10 M. I. A. 279	519
Bhupati Nath Smrithitirtha *v.* Ramlal Maitra (1909) I. L. R. 37 C. 128 at 140	577
Bibi Sharifan *v.* Mahomad Habibuddin, (1911) 13 C L J 535 ...	573
Bijoy Gopal Mukerji *v.* Girindra Nath Mukerji,(1914) I.L R. 41 Cal. 793= 27 M. L. J. 123.	502

	M. L. J. PAGE.
Bilas Kunwar v. Dasraj Ranjeet Singh, (1915) L. R. 42 I. A. 242= 29 M. L. J. 335=37 All 557	74
Bindesri Naik v. Ganga Saran Sahu, (1897) I. L. R. 20 All. 171 P. C. ...	118
Bisseswar Lal Sahoo v Maharajah Luchmessur Singh, (1863) 6 I.A. 233 ...	108
Bobba Padmanabhudu v Bobba-Buchamma, (1918) 35 M. L J. 144 ...	173
Bogra v. Emperor, (1910) I. L. R. 34. M. 141	296 (f)
Bola Nath v. Hara Mohan, (1910) 7 I. C. 251	287
Bombay Corporation v. G. I. P. Railway Co. (1916) L. R 43 I. A. 310=I. L. R. 41 Bom. 291	9
Bombay Improvement Trust v. Jalbhoy, (1909) I. L. R. 33 B. 483 ...	456
Boot v. Smith, (1857) 52 Eng. Rep. 957	236
Boton v. Powell (1852) 2. De. G. M. and G 1 at 21	114
Brewin v. Austin, 2 Keen 211	290
British India Steam Navigation Co. v. Secretary of State for India, (1910) I. L. R. 38 C. 230	97, 98
In re Brooksbank : Beauclerk v James, (1886) 34 Ch. D 160 ...	509
Burges v. Morton, (1896) A. C. 13	293
Burjorji Dorabji Patil v. Dhunbai, (1891) I. L. R. 16 Bom. 1 ...	239
Busk v. Trowbridge Water Works Co, (1875) L. R 10 Ch. A. 459, 462 ...	130

C

Cale Dorian Railway & Co. v. Carmichel, (1870) 2. Sc. App. 56 ...	7
Canadian Pacific Railway v. Roy, (1902) A. C. 220	374
Casperaz v. Kader Nath Sarbadhikari, (1901) I. L. R. 2 C. 788 ...	583
Chajmal Das v. Brij Bukan Lal, (1895) I. L R. 17 All. 511 (P.C.) ...	118
Chander Deo Singh v. Mata Prasad, (1909) I. L. R. 31 A. 176 ...	522
Chatterput Singh v. Maharaj Bahadur, (1904) I. L. R. 32 Cal. 198 (P. C.)	239
Chedi Lal v. Kirath Chand, (1880) I. L. R. 2 A. 682	441
In re Cheese Brough, (1871) 12 Eq. Cases 353	196
Cheri Kandan v. Krishnan Nambiar, (1914) 27 M. L. J. 690 ...	633
Chidambaram Chettiar v. Aiyasami Thevan, (1916) I. L R. 40 M. 585 ...	302
Chidambaram Pillai v. Emperor, (1908) I. L. R. 32 M 3=19 M. L. J. 81	66, 67
Chidambaram Pillai v. Tiruvengathiengar, (1896) 7 M. L. J. 1 ...	466
Chinna Narayudu v Haris Chandara Deo, (1908) I. L. R. 27 M. 23 ...	558
Chintaman Rau Mehendale v. Kashinath, (1889) I. L. R. 14 B. 320 ...	297
Chotku Rai v Baldeo Shukul, (1912) I. L. R. 34 A 659	317
Choudhri Guru Narayan v. Sheo Lal Singh, (1918) 36 M. L. J. 68 ...	296 (c)
Chundi Charan Mandal v. Banke Behari Lal Mandal, (1899) I. L. R. 26 C. 449	578
City of London v. Central London Railway, (1913) A. C. 864 ; 879 ...	6
E. Clemens Horst Co., v. Biddell Brothers, (1911) 1 K. B. 214 ; (Sc.) (1911) 1 K. B. 934 (C. A.) ; S. C. (1912) A. C. 18	152
Collector of Belgaum v. Bhima Rao, (1908) 10 Bom. L. R. 657 ...	455
Collector of Dacca v. Haridas Bysak, (1912) 14 I. C. 163	456
The Collector of Masulipatam v. Cavaly Venkata Narainapah, (1861) 8 M. I. A. 529	501
Cooling v. Saravana, (1888) I. L. R. 12 M. 69	628
Corea v. Appuswamy, L. R (1912) A. C. 230	613
Cornish v. Clark, (1872) L. R 14 Eq. 184	236

	M. L. J. PAGE
Corporation of Ludlow v. Green House, (1827) 1 Bligh N. S. 17. (S. C.) 4 Eng. Rep. 780	407
D	
Debi Prasad Chowdhury *v.* Jolap Bhagat, (1913) I. L. R. 40 Cal, 721 ...	499
In re Devajivalad Bhavani, (1898) I. L. R. 18 Bom. 581	449
Dharmapuram Pandara Sannadhi v. Vira Pandian, (1898) I. L. R. 22 M. 302	119
Dhurandhar Das Sakha Ram v. Bhan Govind, (1873) 10 Bom H C.R. 4	462
Digambar Das *v.* Nisbibala Debi, (1910) 8 I. C. 91	159
Doorga Kripa Roy *v.* Sree Janoo Lothak, (1872) 18 W. R. 465 ...	536
Doraswami Padayachi *v* Vaidyalinga Padayachi, (1917) 33 M L. J. 46 ...	106
Dosibai *v.* Ishwardas, (1891) L R. 18 I. A. 22	350
Dowse *v.* Gorton, (1891) A. C. 190	37
Duraisami Reddi *v.* Muthial Reddi, (1908) I. L. R. 31 M. 453 ...	31
E	
Earl of Harrington *v.* Derby Corporation, (1905) I. Ch. 205 ...	375
East Fremantle Corporation *v.* Annois, (1902) A C. 213	374
Elton *v.* Curties, 19 Ch. D. 49	290
Emperor *v.* Alloomya Husan, (1918) I. L. R 28 Bom 120 at p. 142 ...	228
Emperor *v.* Rash Behari Das, (1908) I. L. R 35 C. 450	203
Empress of India *v.* Jiwanund, (1882) I. L R. 5 A. 221	203
Eressa Menon *v.* Shamu Pattar, (1898) I L. R. 21 M. 138 ...	92
Eriohsen *v.* Last, (1881) 8 Q. B. D. 414	229
In re Evans Evans *v.* Evans, (1887) 34 Ch. D. 597	38
Ex parte Fernandez, (1861) 10 C. B. (N. S.) 3; 39	463
Ex parte Griffith, (1883) 23 Ch. D. 69	193
Ex parte Hill (1883) 23 Ch. D. 695	193
Ezra *v.* Secretary of State for India, (1905), I. L R. 32 Cal. 605 ...	97
F	
Fakir Nynar Mahamad Rowther *v.* Kandasami Kulathu Vandan, (1911) I. L. R. 35 M. 120 at 129	160
Farhall *v.* Farhall, (1871) 7 Ch. A. 123	37
Fisher *v.* Kamakshi Pillai, (1897) I. L. R. 21 M. 136	329
Fisher *v.* Secretary of State for India, (1908) I. L. R. 32 M. 141=19 M. L. J. 131	126
Fisher's Case, (1897) I. L. R 21 M. 136	54
Foley's Charity Trustees *v.* Dindley Corporation, (1910) 1 K. B. 317 ...	339
Forbes *v.* Meer Mohamed Tagee (1870) 13 M. I. A. 438	555
Foulkes *v.* Muthusami Goundan, (1898) I. L. R. 21 M. 503 ...	536
Fullerton *v.* Provincial Bank of Ireland, (1903) A. C 309 ...	621
G	
Gaekwar Sarkar of Baroda *v.* Gandhi Kacharbhai, (1902) I L R 27 B. 344	373
Gann *v.* Free Fishers of Whitstable, (1864-5) 11 H. L. C. 193 ...	100, 332
Ganpat Rai *v.* Munni Lal, (1911) I L R. 34 All. 135	570
Geddis *v.* Proprietors of Bann Reservoir, (1871) 3 A. C. 430 at 438 ...	374
The General Manager of the Raja Durbanga *v.* Maharajah Coomar Ramaput Singh, (1872) 14 M. I A. 605	107

M. L. J. PAGE

Jan Ali v. Ramnath Mundal, (1881) I. L. R. 8 Cal. 32... ... 400

Janaki Ammal v. Narayanaswami Iyer, (1916) I. L. R 39 M. 634=31 M. L J. 225 174

Jawahar Lal v. Indiomati, (1914) I. L. R. 36 A. 201 622

Jawahra v. Akbar Husian, (1884) I. L. R. 7 A. 178 (F.B.) ... 398

Jhanda Singh v. Wahiduddin, (1916) I. L. R 38 A 570=31 M. L. J. 750 (P. C.) 386

In re Johnson: Shearman v. Robinson, (1880) 15 Ch. D. 548 ... 37, 38

K

Kali Dass Ahire v. Monmohini Dassee, (1897) I. L. R. 24 Cal. at p. 447... 667

Kali Kishen Tagore v. Golam Ali, (1886) I L. R 13 Cal 3 and p. 248 ... 554

Kallydass Ahiri v. Monmohini Dassee, (1897) I. L. R. 24 Cal. 440 ... 536, 552

W. Kalmatappa v. Joiesh Narayana Bhat, (1917) 42 I. C. 337 82, 86 88

Kamalu Ammal v. Athikari Sangali Subba Pillai, (1917) 35 M. L. J. 11 ... 251

Kamalammal v. Peeu Meera Levvai Rowther, (1897) 20 M. 481=7 M. L. J. 263 457

Kamaraju v. The Secretary of State for India, (1887) I. L. R. 11 M. 309 (F. B) 357

Kameswar Prasad v. Run Bahadur Singh, (1880) I. L. R. 6 C. 843 ... 634

Kameswar Singh v. Secretary of State for India, (1907 I. L. R. 34. Cal. 470 100

Kandukuri Balasurya Presadha Row v. The Secretary of State for India, (1917) I. L. R 40 M. 886=33 M. L. J. 144=L R. 41 I. A. 166 ... 124

Kandaswami Mudali v. Subroya Mudali, (1909) I. L. R. 32 M. 478 ... 81

Kandukuri Mahalakshmiamma Garu v. The Secretary of State for India, (1910) I. L. R. 34 M. 295=20 M. L J. 823. 124

Karalia Nanubhai v. Mansukhram, (1900) I. L. R. 24 B. 400 ... 301

Karumaru Venkataswami v. Lanka Tripuriah, (1914) 26 I. C. 389 ... 486

Karuppa v. Arumuga, (1882) I. L. R. 5 M. 383 400

Katama Natchiar, v. Raja of Sivaganga, (1863) 9 M. I. A. 539 ... 611

Kathuperumal Rajali v. The Secretary of state for India, (1906) I L. R. 30 M. 245=17 M. L. J. 174 ... ... 296 (a)

Kazi Sujandin v. Madhavdas, (1893) I. L. R. 18 B. 693 ... 82

In re Keshan Narayan, (1912) 14 Bom. L. R. 968 449

Khiarajmal v. Daim, (1904) I. L. R. 32 C. 296 108

Kishan Lal v. Gurudhwaja Prasad Singh, (1899) I. L. R. 21 A. 238 ... 297

Kishen Chunder Ghose v. Musammat Ashoorun, (1863) 1 Marshall's Reports 647 108

Kollaney Kooer v. Luchmee Pershad, (1875) 24 W. R. 305 ... 307

R. P. Koneti Naicker v. J. Gopala Aiyar, (1913) ... M. L. J. 425 ... ...

Kotamraju Venkatarayadu v. Emp...

Kripasindhu Sahu ...

M. L. J.
PAGE

Inre General Rolling Stock Companys Joint Stock Company's claim, (1894) 7 Ch. Ap. 646 105
Ghantayya *v.* Papayya, (1899) I. L. R. 23 M. 531 118
Girija *v.* Kanai Lal, (1917) 27 C. L. J. 339 542
Glegg *v.* Bromby, (1912) 3. K. B. 474 621
Glyn *v.* Howel, L. R. (1909) 1 Ch. 656 615
Gnanambal Ammal *v.* Veerasami Chetty, (1915) 29 M. L. J. 698 ... 107
Goodman *v.* Mayor of Saltash, (1882) L. R. 7. A. C. 628 331
Goono Monee Dassia *v.* Pran Kishore Dosse, (1869) 13 W. R. 69 ... 379
Gopala Muppanar *v.* Dharmakartha Subramania Aiyar, (1914) 27 M. L. J. 253 at p. 258 ... ...397 ; 414
Govindammal *v.* Gopalachariar, (1906) 16 M. L. J. 524 316
Grainger and son *v.* Gough, (1898) A. C. 325 228
Gulabdas Jaggivandas *v.* Collector of Surat, (1878) L. R. 6 I. A. 54 ... 350
Gulabsinghji *v.* Lakshmansingji, (1893) I. L. R. 18 B. 100 ... 442

H

Hakim Lal *v.* Mooshar Sahu, (1907) I. L. R. 34 Cal. 999 234
Hanmantappa *v.* Jivubai, (1900) I L. R. 24 B. 547 579
Hanooman Pershad Pandey *v.* Mussammat Baboo Muraj Kunwaree, (1856) 6 M. I. A. 393 634
Hanuman *v* Hanuman, (1891) L. R. 18 I. A. 158=19 Cal. 123 ... 158; 562
Hanuman Prasad Pandey *v.* Mussammat Babooee Munraj Koonwaree, 6 M. I. A. 407 579
Hanuman Singh *v.* Nanak Chand, (1884) I. L. R. 6 A. 193 ... 297
Harris *v.* Harris, 3 Atkyins, 721 290
Hazari Mall Babu *v.* Abaninath Adharjoya, (1912) 17 C. W. N. 280 ... 297
Herabai *v.* Lakshmibai, (1887) I. L. R 11 B. 573 308
Hill *v.* Barokly, (1811) 18 Ves. 56 369
Hill *v.* South Staffardshire Railway Co., (1874) L. R. 18 Eq. Cases 154 ... 459
Husain Sahib *v* Narasimhappa, (1912) 23 M. L. J. 539 81

I

Ideal Bedding Co *v.* Holland, (1907) 2 Ch. 157 236
Imambundi *v.* Mutsaddi, (1918) 45 I. A. 73 89
Indur Chander Singh *v.* Radha Kishore Ghose, (1892) I. L. R. 19 Cal. 507 (P. C.) 31, 32, 36, 37
Ishan Chundar Mitter *v.* Baksh Ali Souddagar, (1863) 1. Marshall's Reports 614 108
Ishar Das *v.* ... 911) I. L. R. 34 A. 186 ... 299
Ishar D... R. 32 A. 667 541
...2) I. L. R. 27 B. 146 ... 237
... ... 182

M. L. J. PAGE

Krishna Nambiar v. Kannan, (1897) I. L. R. 21 M. 8 159
B. Krishna Rao v Lakshmana Shanbhogue, (1881) I. L. R. 4 M. 302 ... 357
Krishnaswami v. Varadaraja, Varadaraja v. Venkatachala, (1882) I. L. R. 5 M. 345 (F. B.). 479

19

Krishnasami Aiyangar v. Ranga Aiyangar, (1896) I. L. R 20 M. 369=7 M. L. J. 71 382
Kumar Hari Narayan Singh Rao Bahadur v. Sriram Chakravarthi, (1910) L. R. 37 I. A. 136=20 M. L. J. 519 667
Kumura Appalaswami v. Palli Narayanaswami, (1918) 36 M. L. J. 62 ... 122
Kunchi v. Ammu, (1912) I. L. R. 36 M. 591 565
Kunhi Krishna Menon v. Kunhi Kavamma, (1918) 35 M. L. J. 565 ... 566
Kunj Behari v. Keshavlal Harilal, (1904) I. L. R 28 B. 567 ... 629
Kuppa v. Dorasami, (1882) I. L. R. 6 Mad. 76 356
Kurri Veerareddy v Kurri Bapi Reddy, (1904) I. L. R. 29 M. 336 ... 300
Kuttayan v. Maunnama Ravuthan, (1911) I. L. R. 35 M. 681 ... 271

L

Lachmeswar Singh Bahadur v. Syad Lutf Ali Shah, (1871) 8 Beng. L. R. 110 ... ... 296 (h)
Lakshman Dada Naik v. Ramachandra Naik, (1880) I. L. R. 5 B. 48 ... 617
Lakshmanaswami Naidu v. Rangamma, (1902) I. L. R. 26 M. 31 ... 356
Lala Kalyan Das v. Sheikh Magbul Ahmed, (1918) 35 M. L. J. 169 (P. C.). 457
Lalit Mohan Singh Roy v. Chakkum Lal Roy, (1898) L. R. 24 I. A. 76 ... 850
Lamp leigh v. Braithwaite D. Sm. L. C. Vol. I 10th Edn. 136 ... 620
In re Land Acquisition Act- *In re* Rustomji Jijib, (1905) I. L. R. 30 B. 341 101
London Chatham and Dover Railway Co., v. South Eastern Railway Co., L. R. (1893) A. C. 429 460
In re Lord Chesham : Cavendish v. Dacre, (1886) 31 CH. D. 466 ... 510
Lowell and Christmas Ltd. Commissioner of Taxes, (1908) A. C. 146 ... 228
Luchmeswar Singh v. Chairman Darbanga Municipality, (1890) I. L. R. 18 Cal. 99 100
Lyon v. Fishmonger's Company, (1876) 1 A. C. 662 138

M

Madana Mohana Deo v. Purushothama Deo, (1918) L. R. 45 I. A, 156 : 35 M. L. J. 138 519
[redacted] The Secretary of State for India, (1903) I. L. R. [redacted]. 386 139
Madavarayadu v. Subbamma, (1916) 31 M. L. J. 222 108
Mahamaya Debi v. Haridas Haldar, (1914) I. L. R. 42 C. 455 ... 168, 356
Mahammad Afzal Khan v. Gulam Kasim Khan, (1903) I. L. R. 30 Cal. 843 (P. C.) 510
Maharana Shri Ranmalsingji v. Vadilal Vakhatchand, (1894) I. L. R. 20 Bom. 61 at p. 70 ... ... 35, 37, 38
Mahomed Akbar Zamankhan v. Sukdeo Pande, (1911) 13 C. L. J. 467 ... 574
Mahomed Rowthan v. Mahomed Husin Rowthan, (1899) I. L. R. 22 M. 337 ; 9 M. L. J. 135 188
Manoharam v. Pranshankar, (1882) I. L. R. 6 Bom. 298... ... 356

M. L. J. PAGE

The Manchester, Sheffield, Lincolnshire Railway Company *v.* The North Central Wagn Company, (1888) 13 A. C. 554 391

Manna Lal *v.* Bank of Bengal, (1876) I. L. R. 1 A. 309 620

Mannada Mudali *v.* Nallaya Goundan, (1909) I. L. R. 32 M. 527 ... 86, 88

Mannu Lal *v.* Radakishenji, (1916) 36 I. C. 989 576

Manohar Ganesh Tambekar *v.* Lakshmiram Govindram, (1887) I L. R. 12 B. 247. 577

In re Maria Annie Davies, (1888) 21 Q. B. D. 236 463

Mariam Beevi Ammal *v.* Kadir Meera Sahib Taragan, (1915) 29 I. C. 275. 460

Marudamuthu Nadan *v.* Srinivasa Pillai, (1897) I. L. R. 21 M. 128 ... 501

Marudevi *v.* Pammaka, (1911) I. L. R. 36 M. 203=22 M. L. J. 390 ... 565

Maruthai Goundan *v.* Dasappa Goundan, (1916) 31 M. L. J. 375 ... 390

Mayandi Chettiyar *v.* Chokkalingam Pillai, (1904) I. L. R. 27 M. 291 ... 474

Mason *v.* Hill, (1833) 5 B. and Adol 1=110 E. R. 692 130

Muthura Das *v.* Raja Narindra Bahadur, (1896) I. L. R. 19 A. 39=6 M. L. J. 214 118

Mc, Chelland *v.* Manchester, Corporation, (1912) 1 K. B. 118 ... 376

Mc, Ca, *v.* Robertson, (1897) L. R. Ac. 129 130

Meango *v.* Baviah, (1917) 45 I. C. 507 ... ... 296 (e)

In the matter of Medai Kaliani Anni, (1907) I. L. R. 30 M. 545 ... 179

Mercer *v.* Dennie, (1904) 2 Ch., 534 at5 56 339

Mir Sarwarajan *v.* Fakharuddin Mahomed Chowdhry, (1906) I. L. R. 34 Cal. 163 38

Mir Sarwarajan *v.* Fakharuddin Mahomed Chowdhry, (1911) I. L. R. 39 C. 232 (P. C.) 38

Mohidin Kutti *v.* Kunhi Koyan, (1914) 27 M. L. J. 691 633

Mohiuddin *v.* Saiyiduddin, (1894) I. L. R. 20 Cal. 810 415

Monmohan Karmokar *v* Dwarak Nath Karmokar, (1910) 12 C. L. J. 312. 380

Monmotho Nath Das *v.* Harish Chandra Das, (1906) I. L. R 33 Cal. 905. 398

Morgan *v.* Briscoe, (1886) 31 Ch. D. 216 89

Morris *v.* Wise, (1860) 2 F and F. 51 255

Moulvi Mahomed Shumsool Hooda *v.* Shewakram, (1874) L. R. 2 I. A. 7. 307

Mahammad Jafar *v.* Mahammad Ibrahim, (1900) I. L. R. 24 M. 243 ... 272

Mulchand *v.* Shib Charan Lal, (1880) I. L. R. 2 A. 676 441

Muna Mahammad Rowther *v.* Muthu Alagappa Chettiar, (1917) 34 M. L. J. 234 479

Municipality of Picton *v.* Geldert, (1893) A. C. 524

Murugesam Pillai *v.* Manikavasaka Desika Gnana Sambanda Pand Sannadhi, (1917) I. L. R. 40 M. 402=32 M. L J. 369 ... 570

Muthammal *v.* The Secretary of State for India, (1914) I. L. R. 39 M. 1202=27 M. L. J. 599 357

Muthayya *v.* Sudalaimuthu, (1909) 20 M. L. J. 119 ... ... 81, 88

Muthialu Chetti *v.* Bapun Sahib, (1880) I. L R. 2 M. 140, ... 81

Muthu Ammal *v.* Gopolan, (1912) I. L. R. 36 M. 593=23 M. L. J. 496 565

Muthukaruppa Mudali *v.* Kathapudyan, (1914) 27 M. L. J. 249 ... 620

Muthusami Pillai *v.* Dorasami Pillai, (1901) 11 M. L. J 310 ... 579

	M. L. J. PAGE
N	
Nachiappa Mudali *v.* Aiyaswami Aiyar, (1882) I. L. R. 5 M. 189 ...	64
Nagama *v.* Sivanappa, (1914) I. L. R. 38 M. 1162; (S. C.) 27 M. L. J. 520	173
Nagu *v.* Salu, (1890) I. L. R. 15 Bom. 424	358
Nagu Chetti *v.* Bhaskara Sethupathi, (1911) 1 M. W. N. 6 ...	380
Nairu *v.* The University of St. Andrews, (1909) A. C. 147 ...	150
Nalam Visvanathem *v.* Official Assignee of Madras, (1915) 32 I. C. 795 ...	195
Namaswayam Pillai *v.* Kuthalingam Pillai, (1917) M. W. N. 78 ...	310
Nand Ram *v*, Bhopal Singh (1911) I. L. R. 34 All. 126	524
Nanjappa *v.* Nanjappa Row, (1912) 23 M. L. J. 290	294
Narasimha Sastrial *v.* Secretary of State for India, (1891) 1 M. L. J. 167	148
Narasingh Sheobakes *v.* Pachu Rambakas, (1913) I. L. R. 37 Bom. 538 ...	563
Narayan Ramakrishna *v.* Vighneshwar, (1916) I. L. R. 40 B. 378 ...	388
Narayanasami Naidu *v.* Secretary of State for India, (1912) 24 M. L. J. 36	205
Natesa Aiyar *v.* Appavu Padayachi, (1909) I. L. R. 33 M. 375 ...	370
Nathuram *v.* Shomachhagan, (1890) I. L. R. 14 B. 562	38
Niamutkhan *v.* Phadu Buldia, (1880) I. L. R. 6 Cal. 319 (F. B.) ...	650
Nidamarthi Mukkanti *v.* Thammana Ramayya, (1902) I. L. R. 26 M. 76	294
Nizamuddin *v.* Mamtozuddin, (1900) I. L. R 28 C. 135	552
Nobokishore *v.* Hari Nath Sarma Roy, (1884) I. L R. 10 Cal. 1102 ...	500
Nogendra Chandra Dey *v.* Amarachandra Kundu, (1908) 7 C.W. N. 725 ...	570
Norendra Nath Sircar *v.* Kamalabasini Dasi, (1876) I. L. R. 23 C. 563=6 M. L. J. 71	196
Numberumal Chettiar *v.* Krishnajee, (1914) 26 M. L J. 357 ...	352
O	
Odai Muthayya *v.* Kavarai Kothaldaramayya, (1914) M. W. N. 387 ...	810
Omrita Nath Mitter *v.* Administrator General of Bengal, (1897) I. L. R. 25 C. 54	458
P	
Padmanabhayya *v.* Ranga, (1910) I. L. R. 34 M. 161	537
Palaniandi Chetty *v.* Appavu Chettiar, (1916) 30 M. L. J. 265 ...	233 454
Palaniappa Chettiar *v.* Ramaswami Chettiar, (1916) 32 M. L. J. 54=20 M. L. T. 557 at p. 559	61
Palaniappan *v.* Subbaroya Goundan, (1913) 1 L. W. 80	386
Pallaya *v.* Ramanadhanulu, (1903) 13 M. L. J. 364	579
Panchcowrie Mull *v.* Chumrolall, (1878) I. L. R. 3 Cal. 563 ...	398
Paramaswami Aiyangar *v.* Alamu Nachiar, (1918) 35 M. L J. 632 ...	574
Parthasarathy Appa Rao *v.* Chenandra Venkata Narasayya, (1910) I. L. R 33 M. 177=20 M. L J 596 (P. C.)	331
Pattabhiramayyar *v.* Venkata Rao, (1870) 13 M. I. A, 560 ...	162
Peary Mohun Aich *v.* Ananda Charan Biswas, (1891) I. L. R. 18 C. 631 ...	573
Phillips *v.* Halliday, (1891) A. C. 228	333
Pingala Lakshmipathi *v.* Bommaredipalli Chalamayya, (1907) I. L. R. 30 M. 434	266
Pokker *v.* Kunhama, (1918) I. L. R. 42 M. 143=36 M. L J. 231=9 L. W. 138	454

	M. L. J. PAGE
Ponnuswami Padayachi v. Karuppudayan, (1914) I L. R. 38 M. 813=26 M. L. J. 285	250
Pragdas v. Girdhardas, (1901) I. L. R. 26 B. 76	294
Pranath Shaha v. Madhu Khula, (1886) I. L. R. 13 C. 96... ...	553
President District Board, Tanjore v. Kunnusami Thondaman, (1916) 35 I. C. 121...	250
Preston Banking Co. v. William Allusup & Sons, (1895) 1 Ch. 141 ...	29
Public Prosecutor v. Maduvaluth Gopal, 1 Weir 737	28
Pulla Kannayya Chetti v Rudrabhatta Venkata Narasayya, (1916) I. L. R. 40 M. 1	442
Punardeo Narain Singh v Ram Sarup Roy, (1889) I. L. R. 25 Cal. 858 ...	223
Punniah v. Kottamma, (1916) I. L. R. 40 M. 989	265
Pydigantum Jagannatha Rao v. Rama Das Patnaik, (1904) I. L.R. 28 M. 197	94, 95

Q

Queen Empress v. Ayyakannu Mudaliar, (1898) I. L. R. 21 M. 293 ...	27, 28
Queen Empress v. Bal Gangadhar Tilak, (1897) I. L.R. 22 B. 150 ...	67
Queen Empress v. Girdhari Lal, (1886) I L R. 8 A. 653 ...	203
Queen Empress v. Sabapathi, (1888) I. L. R. 11 M. 411 ...	203
Queen Empress v. Samavier, (1892) I. L. R. 16 Mad. 468 ...	66

R

Radhabai v. Chinnaji Bin Ranji Sali, (1878) I L. R. 3 Bom. 27 ...	399
Radha Madub Samanta v Sasti Ram Sen, (1899) I. L. R. 26 C. 826 ...	564
Radha Prashod Mullick v. Ranee Mani Dassee, (1903) I. L. R. 35 C. 896 (P. C.)	309
Raghunada Dev v' Brojo Kishore Dev, (1876) L. R. 3. I. A. 154 ...	47
Raghunath Presad v. Govinda Prasad, (1885) L. R. 8. I. A. 76 ...	579
Raghunatha v, Brozo Kishore, (1876) L. R. 3 I. A. 154: 1 M. 69 ..	519
Raghunathji Tarachand v. The Bank of Bombay, (1909) I. L. R. 34 Bom. 72	570
Rahimadulla Sahib v. Emperor (1907) I. L. R. 31 M. 140 at 146. ...	354
Raj Bahadur Singh v. Achmmbit Lal (1879) L. R. 6 I. A. 110 ...	358
Raj luckhee Debia v. Chander Kant Choudhry, (1870) 14 W. R. 173 ...	81
Raj Lukhee Dabea v. Gokool Chunder Chowdhry, (1869) 13 M. I. A. 209 ...	502
Raja Jagavara Rama Venkateswara Ettappa v. Alavaraa Asari, (1918) 45 I. A. 195 (1918) M. W. N. 782=36 M. L. J. 49	329
Raja Parthasarathi Appa Rao v. Chenendra Chinna Sundra Ramayya, (1904) I. L. R. 27 M 543	331
Raja Sri Sri Durga Prasad Singh v. Braja Nath Bose; (1911) L. R. 39 I. A. 133	667
Raja Vallanki v. Venkata Rama, (1876) L. R. 4 I. A. 1=I. L. R. 1 M. 174.	46, 47
Rajagopala Charyalu v. Secretary of State, I. L. R. 38 M. 997 ...	124
Rajah Hurranath Roy Bahadur v. Rundir Singh, (1891) L. R. 18 I. A 1...	524
Rajah of Palghat v. Raman Unni, (1916) 33 M. L. J. 26... ...	94
Rajah Varmah Vallia v Ravi Varmah Kunhi Kutti, (1876) I. L R. 1 M. 235 at p. 252	355
Rajaram v. Narasinga, (1891) I. L. R. 15 M. 199	586

	M.L. J. PAGE
Ram Lal Mukerjee, v. Secretary of State for India, (1881) L. R. 8 I. A. 46 ...	849
Ram Narayan Singh, v. Adhindra Nath Mukerjee, (1916) I. L. R. 44 C. 888=32 M. L. J. 39 ...	286
Ram Nath v. Bulaji Ram, (1912) 17 I. C. 785 ...	297
Rama Aiyangar v. Gurusami Chetty, (1918) 35 M. L. J. 129 ...	536
Ramadoss v. Hanumantha Rao, (1911) I. L. R. 36 M. 364 ...	656
Ramalingam In re, (1915) I. L. R 40 M. 100 ...	448
Ramalingam Chettiar v. Ramasami Aiyar, (1903) 13 M. L. J. 379 ...	109
Raman Nambiar v. Raman Nambiar, (1914) 27 M. L. J. 175 ...	633
Ramanathan v. Ranganathan, (1917) I. L. R. 40 M. 1134 ...	300
Ramanathan Chetty v. Noor Mahammed Marakkayar, (1900) 11. M. L. J. 183 (F. B.) ...	118
Ramanugra Narain v Mahasundar Kunwar, (1873) 12 Ben. L. R. 433 (P. C.) ...	77
Ramanuja Ayangar v, Sadagopachariar, (1914) 27 M. L. J. 329 ...	310
Ramasami v. Appavu, (1887) I. L. R. 12 M. 9 ...	335
Ramaswami Chettiar v. Oppilamani Chetty, (1909) I. L. R. 33 M. 6=19 M. L. J. 671 ...	107
The Ramnad Case, (1868) 12 M. I. A. 397 ...	42
Rangappa Naik v. Kampti Naik. (1908) I. L. R. 31 M. 366 ...	505
Rangasami Naicken v. Varadappa Naicken, (1894) I. L. R. 17 M. 462 at p. 467 ...	399
Rangit Singh v. Koer Gujraj Singh, (1873) L. R. 1 I. A 9 ...	616
Rani Dharam Kunwar v. Balwant Singh, (1912) L. R. 39 I. A. 142=23 M. L. J. 200 ...	604
Rathna Chetti v. Narayanasami Chetti, (1914) 26 M. L. J. 616 ...	310
Ratnam v. Sivasubramania, (1892) I. L. R. 16 M. 353=3 M. L. J. 139 ...	579
Ratnasabapathi Pillai v Ramasami Aiyar, (1910) I. L. R. 33 M. 452 ...	626
Ravaneshwar Prasad Singh v. Chandi Prasad Singh, (1911) I. L. R. 38 C. 721 ...	635
Reese River Silver Mining Co, v. Atwell, (1869) L. R. 7 Eq. 347 ...	236
Reigate v. Union Manufacturing Co. (1918) I. K B. 592 (C A.) at pp, 596, 607 ...	152
Re, Maddever ; Three Towns Banking Co. v. Maddever, (1884) 27 Ch. D. 523 ...	236
Re Mouat, (1899) I Ch. 831 ...	236
Rengacharriar v. Pranatharthiarachar, (1915) 18 M. L. T. 122 ...	269
Rex v. The Inhabitants of Oxfordshire, (1830) I B and Ad. 289 at 301=109 E. R. 794 ...	137
Rells v. Vestry of St. George, (1880) 14 Ch. D. 785 ...	6
Roper v. Johnson, (1873) L R. 8 C. P. 16 ...	152
Royazuddi Sheik v. Kalinath Mookerjee, (1906) I L. R. 33 C. 985 ...	624
Run Bahadur Singh v. Lucho Koer, (1884) I. L. R. 11. C. 801 (P. C.) ...	646

S

Sadagopacharlu v. Satrughna Behara, (1912) 23 M. L. J. 445 ...	257
Sadasiv Dinkar Joshi v. Dinkar Narayan Joshi, (1882) I. L. R. 6 B. 520 ...	297
Saddananda Maiti v Nowrattam Maiti, (1871) 8 Ben. L. R. 280 ...	20

M. L. J.
PAGE

Sahi Bhushan Misra *v.* Jyoti Prashad Singh Deo, (1916) L. R. 44 I. A. 46, ... 663
Sajedu Raja Choudhuri *v* Gour Mohum Das Baishnav, (1897) I. L. R. 24 C. 418 411
Sakho Narayan Khandalkar *v.* Narayan Bhikkagi Khandalkar, (1869) 6 Bom. H. C. R. 239 at p. 241 616
Sambasiva Aiyar *v.* Venkateswara Aiyar, (1907) I. L. R. 31 M, 179 ... 307
Sambasiva Chari *v.* Ramasami Reddi, (1898) I. L. R. 22 M. 179=8 M. L J. 265 573
Sanka Krishnamurthi *v.* The Bank of Burma, (1911) I. L. R. 35 M. 692=21 M. L. J. 620 ... ... 31, 35, 37
Sankaravadivelu *v.* Secretary of State for India in Council, (1904) I L. R. 28 M. 72 373
Saraswati Pattack *v.* The Land Acqn. Deputy Collector of Champeran, (1917) 2 P. L. J. 204... 98
Saravana Mudali *v.* Rajagopala Chetty, (1903) 17 M. L. J. 569 (F. B.) ... 352
Satku Valadkadir Sausara *v.* Ibrahim Aga Valad Mirza Aga, (1877) I. L R. 2 B 457 ... ... 81, 84, 85, 86, 87
Saudagar Singh *v.* Pardip Narayan Singh, (1917) I. L. R. 45 Cal. 510=34 M. L. J. 67 171
Savitri Ammal *v.* Ramaswami, (1898) 8 M. L. J. 266 300
Savitri Antaranjanam *v.* Raman Nambudri, (1900) I. L. R. 24 M 269 ... 296
Secretary of State for India *v.* Ambalavana Pandara Sannadhi, (1910) I L. R. 34 M. 366 124
Secretary of State for India *v.* Ambalavana Pandara Sannadhi, (1917) 33 M. L. J. 415 124
Secretary of State for India *v.* Assan, (1915) I. L. R, 39 M. 727=30 M.L. J. 255 225
Secretary of State *v.* Janakiramayya, (1913) I. L. R. 37 M. 322 ... 124
The Secretary of State for India *v.* Janakiramayya, (1915) 29 M. L. J. 389 124
Secretary of State *v.* Mahadeva Sastri, (1916) I. L. R. 40 M 5=32 M. L. J. 411 120
Secretary of State of India *v.* Maharajah of Bobbili, (1915) 30 M. L. J. 163 124
Secretary of State for India *v.* Raghunatha Thathachariar, (1912) 24 M. L. J. 81 206
The Secretary of State for India in Council *v.* Venkayya, (1916) I. L. R. 40 M. 910=30 M. L. J 575 315
Segu Rowthan *v.* Alagappa Chetty, (1913) 26 M. L. J. 269 ... 325
Seshadri Aiyangar *v.* Ranga Bhattar, (1911) I. L. R. 35 M. 631 ... 362
Seshayya *v.* Narasamma, (1899) I. L. R. 22 M. 357 308
Seth Doog Chand *v.* Mamuji Musaji, (1916) 25 C. L. J. 539 ... 542
Sham Sundar Lal *v.* Achhan Kunwar, (1898) L R. 25 I. A. 183 ... 502
Sharp *v.* Jackson, (1899) A. C. 419 193
Sheoparson Singh *v* Ramnadan Prasad Singh, (1916) I. L R. 43 Cal. 705, 706 654
Shivaji Yesji Chawan *v.* The Collector of Ratnagiri, (1886) I. L. R. 11 B. 429 35

	M. L. J. PAGE
Shooshee Bhushan Rudro v. Govind Chunder Roy, (1891) I. L. R. 18 C. 231	578
Shrimant Sagajirao v. S. Smith, (1895) I. L. R. 20 B. 736, 738 ...	441
Shunmugam v. Moideen, (1884) I. L. R. 8 M. 229	105
Sikkandar Rowthan v. The Secretary of State for India, (1916) 5 L. W. 402	264
Simulu Ebrahim Rowthan v. Abdul Rahim Mahommad, (1898) 8 M. L. J. 182	188
Sinaya Pillai v. Muniswami Ayyan, (1899) I. L. R. 22 M. 289 ...	38
Sinda Sri Ganpat Singhji v. Abraham alias Vajir, (1895) I.L.R. 20 B. 755.	620
Singa Pillai v. Govinda Pillai, (1917) I. L. R. 41 M. 435 ...	296 (a)
Sinnu Pandaram v. Santhoji Row, (1902) I. L. R. 26 M. 428 ...	385
Siriparupu Ramanna v. Mallikarjuna Prasada Naidu, (1893) I. L. R. 17 M. 43=3 M. L. J. 207	109
Sithal Pershad v. Luchmi Pershad, (1883) I. L. R. 10 Cal. 30 ...	392
Sivalinga Pillay v. Marutha Pillai, (1912) 14 I. C. 562 ...	542
Siva Narayan Ghosh v. Kamakhaya Ghose, (1913) 23 I. C. 877 (Cal.) ...	38
Sonet Koer v. Himmut Bahadur, (1876) I. L. R. 1 Cal. 391 ...	208
Soni Ram v. Kanhaiya Lal, (1913) I. L. R 35 All. 227	106
Soorjomonee Dayee v. Suddanund Mohapatter, (1873) 12 B. L. R. 304 at 315=L R. I. A. Sup. Vol. 212	651
Sree Sankarachari Swamiar v. Varada Pillai, (1903) I. L. R. 27 M. 332 ...	109
Sreevadhu Yerramma v. Donkira Kannamma, (1911) I. L. R. 35 M. 704 at 706	268
Sri Mahant Prayag Dasje v. Vangama Naidu, (1918) 7 L. W. 477 ...	324
Srimath Daivasikamani Pandara Sannadhi v. Noor Mahomed Rauthan, (1907) I. L. R. 31 M. 47	38
Sri Narayan v. Lal Raghubans Rai, (1913) 25 M. L. J. 27 ...	297
Srinivasachariar v. Raghavachariar, (1897) I. L. R. 23 M 28=7 M. L. J. 281	398
Sri Rajah Bomma Devara Venkata Narasimha Naidu v. Ramamma, (1913) M. W. N, 551	109
Sri Raja Datla Venkata Surya Narayana Jagapathi Raju v. Goluguri Bapiraju, (1910) I. L. R. 34 M. 143...	296 (b)
Sri Raja Lakshmi Devi Garu v. Sri Raja Surya Narayana Dhatraju Bahadur Garu, (1901) I. L. R. 24 M. 562	616
Sri Rajah Simhadri Raju v. Secretary of State, (1914) I. L. R. 39 M. 67 ...	124
Sriramulu v. Dalayya, (1905) 16 M. L. J. 54	179
In re Stevens : Cooke v. Stevens, (1898) 1. ch 152 at P. 178 ...	186
Stone v. Corporation of Yeovil, (1876) 2. C. P. 99, 107	130
Strickland v. Symons, (1884) 26 Ch D. 245	87
Subba Rao v. Devu Shetti, (1894) I. L. R. 18 M. 126	317
Subbaraya v. Rajagopala, (1914) I L. R. 38 M. 887	159
Subbarayadu v. Lakshminarasamma, (1913) I. L. R. 38 M 775 ...	299
Subbaraya Ravuthaminda Nainar v. Ponnusami Nadar, (1897) I. L. R. 21 M. 364	289
Subbayya v Krishna, (1890) I. L R. 14 Mad. 186=1 M. L. J 95 ...	403
Subramania Aiyar v. Arumuga Chetti, (1902) I. L. R. 26 Mad. 330 ...	31, 38;
Subramania Aiyar v. Muthiah Chettiar, (1917) I. L. R. 41 M. 612=33 M. L. J. 705	282 ; 454

	M. L. J PAGE
Subramania Aiyar *v.* Subramania Aiyar, (1908) I. L. R. 31 M. 250 ...	457
In re Suffield and Watt *Ex parte*: Brown, (1888) 20 Q B D. 693 ...	29
Sulaiman *v.* Baiyatumma, (1916) 32 M. L. J. 137	531
Sundaram Aiyar *v.* Theethapa Mudaliar, (1917) 40 I. C. 159 ...	109
Sundarambal Ammal v. Yogavana Gurukkal, (1914) I. L. R. 38 M. 850 ...	356
Sundararaja Aiyangar v. Pattanathaswami Tever, (1894) I. L. R. 17 M. 306	38
Sundar Koer *v.* Rai Sham Krishen, (1906) I. L. R. 34 C. 150 ...	289
Suppa Pillai *v.* Nagayasami Thumbichi Naicker, (1907) I. L. R. 31 M. 19	337
Surajmani *v.* Rabi Nath Ojha, (1907) I. L. R. 30 A. 84	307
Suryanarayana *v.* Potanna, (1918) I. L. R. 41 M. 1012 (P. C.) ...	273
Swaminatha Aiyar *v.* Srinivasa Aiyar, (1916) 32 M. L. J. 259 ...	32
T	
Thakarain Balraj Kunwar *v.* Rai Jagpatpal Singh, (1904) L. R. 31 I. A. 132=I. L. R. 26 All. 393	224
Thambusami Mudali *v.* Hossain Rowthan, (1875) I. L. R. 1 M. 1 ...	162
Thathothathil Pokkar *v.* Ramachandra Shenoy, (1914) 16. M. L. T. 478.	118
Thiruvambala Desikar *v.* Manikkavachaka Desikar, (1917) I. L R. 40 M. 177	364
Thornton *v.* Franee, L. R. (1897) 2 Q B. 143	615
Thumbaswamy Mudali *v.* Hossain Rowthen (1875) I. L. R. 1 M. 1 ...	392
Timmarsa Puranik *v* Badiya, (1865) 2 Bom. H. C. R. 66 ...	208
Tuljaram Rao *v.* Alagappa Chettiar, (1910) I. L. R. 35 M. 1=21 M. L. J. 1	352
U	
Unhamma Devi *v.* Vaikunta Hegde, (1893) I. L. R. 17 M. 218, ...	553
Unide Rajah Raji Bommarazu Bahadur *v.* Ponnuasami Venkatadry Naidu, (1858) 7 M. I. A. 128	273
Unni Koya *v.* Umma, (1911) I. L. R. 35 M. 622=21 M. L. J. 577 ...	106
V	
Vacchani *v.* Vacchani, (1908) I. L. R. 33 Bom. 307	439
Vaithinatha Aiyar *v.* Vaithilinga Mudaliar, (1915) 18 M. L. T. 374 ...	541
Varathayyangar *v* Krishnaswami, (1886) I. L R. 10 M. 102 ...	647
Velayuda Chetty *v.* Govindasami Naicken, (1907) I. L. R. 30 M. 524=(1910) I. L. R. 34 M. 543	316
Velayuthan *v.* Lakshmana, (1885) I. L. R 8 M. 506.	358
Veluthakal Chirudevi *v.* Veluthakal Tarward Karnavan, (1916) 31 M. L.J. 879, 881	530
Vengan Poosari *v.* Patchamuthu, (1903) 14 M. L. J. 290	626
Venkaji Krishna Nadkarni *v.* Lakshman Devji Kandar, (1895) I. L. R. 20 B. at p. 354	553
Venkatachalla Goundan *v.* Rangaratnam Aiyar, (1913) 24 M. L. J. 571 ...	483
Venkatagiri Raja *v* Pichanna, (1885) I. L. R. 9 M. 27	54, 337
Venkatagopal *v.* Rangappa, (1883) I. L. R. 7 M. 365	53, 327
Venkata Narayana Pillai *v* Ponnusami Nadar, (1917) I. L. R. 41 M. 357.	364
Venkata Perumal Raja *v.* Ramudu, (1915) I. L. R 39 Mad 84=28 M. L. J. 81	325
Venkatarama Batha *v.* Gunda Ranga, (1908) I. L. R. 31 M. 403 ...	537
Venkataramana *v.* Venkatapathi, (1915) 28 M. L. J. 510 ...	586
Venkataramayya *v.* Lanka Ramabrahmam, (1918) 35 M. L. J. 124 ...	159

	M. L. J. PAGE
Venkataratnammal v. Secretary of State, (1912) I L. R. 37 M. 366 ...	205
Venkataraz v Kottaya, (1912) 23 M. L. J. 223	310
Venkatta Reddy v. Yellappa Reddy, (1916) 5. L. .W. 234	300
Venkatasuryanarayana v. Sivasankaranarayana, (1914) 17 M. L. T. 85 ...	646
Venkatasawmi Naicker v Muthusawmi Pillay, (1917) 34 M. L. J. 177	31, 32, 38
Verabhai Ajubhai v. Bai Hiraba, (1903) L. R. 30 I. A. 234 ...	518
Vidyapurana Thirthaswami v. Ugganu, (1910) I. L. R. 34 M. 231 at 238	209
Vinayak v Govind, (1900) I. L. R 25 Bom. 129	503
Viraragava Reddi v. Subbaka, (1882) I. L. R. 5 M. 397 ...	178, 378
Viravan Ambalam Periakaruppan Ambalam v. Annasawmi Aiyar, (1911) 21 M. L. J. 845	483
Vishnu Ramachandra v. Appaji Chandhari, (1395) I L. R 21 B. 325 ...	612
Vithu v. Dhondi, (1890) I. L. R 15 Bom. 407	553, 554
Vivan v. Moat, (1881) 16 Ch. D. 730	554
W	
Waghala Rajsanji v. Shekh Masludin, (1837) I. L. R. 11 Bom. 551	30, 31, 32, 35, 36, 37, 38, 39
Wallis v. Hands, L R. (1893) 2 Ch. 75	316
Ward v. Eyre, (1880) 18 Ch. D. 130	459
Watson & Co. v. Sham Lal Mitter, (1880) I. L R. 5 Cal. 331 ...	39
Whatton v. Cradock, 1 Keen 267=48 E. R 309	290
Willis v. Sir G Gipps, (1846) 5 Moor's P. C. 379	365
Wolverhampton and Walsall Railway Co, London v North Western Railway, Co. 16 Eq cases 433	315
Y	
Yachuri Ramamurthi v. Yachuri Ramanna, (1916) 30 M. L. J. 308 ...	535
Yelikappali Venkaya v. Venkataramayya Appa Rao, (1917) 33 M. L J. 757	251
Z	
Zamindar of Kapileswrapuram v Secretary of State, (1912) I L. R 37 Mad 355	124

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PRIVY COUNCIL.

PRESENT :—LORD SHAW, SIR JOHN EDGE, MR. AMEER ALI AND SIR WALTER PHILLIMORE, BART.

[On Appeal from the High Court of Judicature at Bombay.]

Ratanlal Choonilal Panalal ... *Appellant.**

v.

The Municipal Commissioner for the City of Bombay and others. ... *Respondents.*

P. C.

Ratanlal Choonilal Panalal *v.* The Municipal Commissioner for the City of Bombay.

Street schemes in the City of Bombay—Bombay Improvement Trust—City of Bombay Improvement Act 1898 (*Bombay Act IV of* 1898) *Ss.* 31, 41, 42, 45—*Compulsory expropriation and impropriation of owners of land adjoining streets—Whether such an owner need pay for compulsory impropriation—Street "to be formed" its meaning—City of Bombay Municipal Act* 1888 (*Bombay Act III of* 1888), *Ss.* 297, 300, 301—*Interest on unpaid price of land—When it begins to run.*

The main object of the City of Bombay Improvement Act, 1898, (Bombay Act IV of 1898), by which the Bombay Improvement Trust was constituted, was to set up with sufficient powers a street-making authority, and when its function as such was expired, to have the street which had been reconstructed or made by the Trust thereupon handed back to the Corporation.

Ss. 41 and 45 of the Act are correlative. They both refer to that ground and no other which is used as a street and for the purposes thereof. The "street to be formed" which vests in the Trust under S. 41 is identical with the formed street which revests in the Corporation under S. 45.

When therefore the "regular line of a street" was altered and the owner of adjacent land required to set forward his building on part of the old street:

Held, that the strip of old street which was never formed into the new street had never vested in the Improvement Trust; that it remained the property of the Municipal Corporation: and that when such owner of adjacent land was ordered by the Commissioner to set forward his building upon it, it became his property in virtue of S. 301 (3) of the Municipal Act of 1888.

* 13, 14, 17 and 18th June, 1918.

P. C.

Ratanlal Choonilal Panalal v. The Municipal Commissioner for the City of Bombay.

Held, also that as the Act makes no provision for payment by such an owner, no price was payable by him for the projection on which he was required or allowed to build.

In the case of a sale or acquisition of land, in the absence of a contract to the contrary, interest on the unpaid price runs from the date when the new owner enters into possession.

Consolidated appeals from two decrees of the Bombay High Court; dated 16th April 1916 confirming decrees of the same Court in its original jurisdiction.

The facts of the case will sufficiently appear from their Lordships' judgment. The appellant when he applied to rebuild his premises had been required to set back in one place and set forward in another: it was admitted he was entitled to compensation for the set back, but as he refused to pay anything for the set-forward, the Bombay Improvement Trust withheld payment of the compensation for the set back, the amount of which had been provisionally agreed. Appellant sued to recover this compensation. This suit is hereafter alluded to as "the first suit". In "the second suit" the Trust sought to eject appellant from the set forward land, on which he had built. They claimed that the said land had vested in them under S. 41 of the Improvement Trust Act. Davar, J., decreed both suits. As to the second, referring to the set forward land, he held:

"This piece of land by virtue of a notification under Section 41 of the Improvement Trust Act and by reason of the provisions thereof became vested in the Improvement Trust in the year 1905, and from that day to this it has remained so vested in the Trust. It has never been handed back to the Municipality and has not been re-vested in that body. The plaintiffs therefore are the legal owners of this piece of land. *They* have never given the defendant or his mother any permission, leave or license to build on their land. The Municipality were under a misapprehension when they sanctioned and ordered the defendant to set forward his building on this land. The defendant's Engineers made no enquiries into the title of this land, but they shared in the mistake of the Municipality. The Improvement Trust are not bound by anything that the Municipality had done in this matter and their rights in the land and in the ownership thereof are not in the slightest degree affected by any action on the part of the Municipal Authorities.

"The next question to consider is whether the plaintiffs are estopped from now re-claiming possession of this piece of land. Mr. Setalwad said that the plaintiffs had stood by and allowed the Defendant to build without correcting his misimpression and therefore they could not now eject him from the land. It seems to me that no

P. C.

Ratanlal Choonilal Panalal *v.* The Municipal Commissioner for the City of Bombay.

question whatever of estoppel against the plaintiffs arises in this suit. The Improvement Trust left the questions of set-forwards and set-backs to be enforced by the Municipality, as building plans went to the Municipal Authorities and not to the Improvement Trust. The defendant never suggested during the whole time that his building was under construction, that he was not bound to pay for the set-forward land. He led the Municipal Commissioner to believe that he was going to pay for the set-forward land. The Improvement Trust took it for granted that the set-forward was enforced by the Municipality in the ordinary way and on the usual terms. There was therefore no reason to stop the defendant from building or to correct any mis-impressions. The Municipal Commissioner has gone so far as to offer by an arrangement with the Improvement Trust to give the defendant a good title to this land if he paid for it. Far from there being any question of estoppel against the plaintiffs, it seems to me that if this had been a suit to enforce payment for the set-forward land, it would have been a difficult position for the defendant to maintain that *he* was not estopped from denying his liability to pay for the same. The defendant asked to be permitted to build on the set-forward land, that permission was given to him and a formal order for set-forward was made as desired by him. He took possession of that land, and built his house five storeys high thereon and during the whole time he kept up the pretence that he was going to pay for such land. Five years afterwards, for the first time he disputed his liability to pay. Throughout all this time he had been masquerading under false pretences. He carried on long correspondence through his solicitors which on his side is by no means distinguished by candour or straightforwardness. Correspondence such as was carried on, on the defendant's behalf, does not help or advance his cause.

The defendant's conduct throughout has been conspicuously unscrupulous and transparently dishonest. Though the defendant is a minor, he is very near the full age limit, and is apparently able to decide for himself. The well meant efforts of Mr. Setalwad which I am glad to acknowledge here with appreciation, failed to move him or his mother and next friend to reconsider their position and to adopt a reasonable and honest attitude. He persisted throughout in maintaining the position which his solicitors took up in their letter of the 7th of September 1911. Every effort to save money and obtain an unfair advantage has been made by the defendant throughout the trial of this case. After all these long years at the hearing for the first time he attempted to dispute the area of the set-forward land. He called an Engineer in support of this contention. The less said about the evidence of that witness the better. Mr. Sanjana who had actually

P. C.

Ratanlal Choonilal Panalal v. The Municipal Commissioner for the City of Bombay.

measured the land in conjunction with the Municipal Officer Harkissandas and had initialled the measurements in token of their correctness, was called by the defendant, but Mr. Setalwad deliberately refrained from asking him any questions on this point. The attempt was abandoned, because it was both hopeless and dishonest. This is the man who asks the Court to exercise its equitable jurisdiction in his favour and compel the bare trustee, as he calls the Improvement Trust Board, to convey to him what the beneficiaries, as he calls the Municipality, gave him. In other words, having obtained other peoples land by false pretences, he asks the Court to help him to retain the same. He asks in the alternative and in the event of all the devices on his part failing to be allowed to retain the land on payment. I refuse to give him any such relief. The Municipal Commissioner has treated this man with conspicuous fairness. He has always offered to accept reasonable payment for the land and procure for him a good title. The defendent has deliberately chosen to fight the case to the last, with the knowledge that the Court regarded his conduct as dishonest and he had no answer to the charge except that he had been advised that the Law allowed him to take up the position he had done. He has taken his chances and he must take the consequences. His last prayer that he may be granted compensation in the event of his being ejected, is a prayer which in its effrontery is only equalled by the consistent dishonesty of the conduct throughout of Mr. Ratanlal Chunilal Panalal. In my opinion he is not entitled to any consideration or help from the Court. He is found to be in possession of the Plaintiffs' land without their leave or license and without a title thereto. Under the circumstances of the present case, the plaintiffs have in my opinion acted quite properly in filing this suit and are justified in re-claiming possession of their land."

With regard to the suit brought by appellant to recover compensation for the set-back land, Davar, J., observed:

"I have pronounced decree in favour of the plaintiff Ratanlal in the first suit. The amount decreed in his favour will not carry any interest. The moneys were always at his disposal. He could have taken those moneys at any time if he had chosen to act with common honesty. His refusal to pay for the set-forward land and his efforts to retain possession of that land without paying for it has necessitated the whole of this litigation. Although I give him a decree in the first suit, that decree will not carry interest on the amount decreed nor will it carry any costs. I have carefully considered the question of costs in the first suit. Having regard to the plaintiff's conduct throughout I seriously considered whether I ought not to make him pay the defendant's costs of the first suit even though he obtains his decree.

On a fuller consideration however I have come to the conclusion that the proper order in the first case is to leave both parties to bear their own costs. The defendant Ratanlal in the second case will pay the plaintiffs' costs of that suit. Such costs to include all costs occasioned by third party notice. The defendant must also pay the costs of the defendant in the first suit (the Municipal Commissioner) occasioned by third party notice in the second suit."

Davar, J.'s decision was upheld on appeal by the Appellate Bench of the Bombay High Court (Basil Scott, C. J., and Batchelor, J). Hence the present appeals.

P. O. Lawrence, K. C. and *E. B. Raikes* for appellant, submitted that there was no power to make appellant pay for the set-forward land. That land was compulsorily vested in him and it would be strange that he should have to pay for it. The provisions as to compensation are to be found in the Bombay Municipal Act, Bombay Act III of 1888, Ss. 289 (1), (2) and (3), 297, 298 (1) and (3), 300, and 301 (2) and (3). If the Corporation require us to set forward, it has to pay compensation for any damage thereby caused to us, but there is no provision for payment by the owner for land which he is compelled to occupy.

We say the land was ours already: we were entitled *usque ad medium filum* at any rate, and directly public rights ended the land vested in us absolutely. The notice which the Municipality gave us, intimating under S. 346 of the Bombay Municipal Act their disapproval of our plans for rebuilding, and giving us permission to rebuild only if we set forward, operated under S. 301 (3) to convey the land to us: or rather the surface right which is all the Corporation ever had.

(*Lord Shaw.*—No "terms and conditions" are set forth. If they wanted to make them they should have inserted them.)

Whether or not the land is ours, the Trust cannot maintain this suit. They have no title themselves: at all events no title which will support an action for ejectment. They claim to have got the land under S. 41 of Bombay Act IV of 1898. They say it did not revest in the Corporation under S. 45 (2) because on account of their own alteration of the line of the street, the whole width of Lohar Chawl was not taken and the set-forward land was not included in the new street. We say that they had no right under S. 41 to acquire public land unless they were going to make it into a street: but in any case they were only bare trustees.

(*Sir W. Phillimore.*—If they take too much land does not the surplus revest with the other ?)

P. C.

Ratanlal Choonilal Panalal v. The Municipal Commissioner for the City of Bombay.

The superficial interest anyhow revested.

(*Lord Shaw.*—Under the notification the land was acquired only for the purposes of the street scheme.)

The Trust was merely a street making authority, the land only vested in them in that capacity. Before we began to build they altered the scheme and their interest in the surface, which was all they ever had, ceased. A vesting claim must be construed according to the purpose for which the vesting is to take place, and operates during the time for which the land is required for that purpose and no longer. ***Rolls*** v. ***Vestry of St. George*** [1] judgment of James, L.J., at p. 797. *City of London* v. *Central London Railway* [2].

Even if the Trust had a title, they cannot eject us: for we were authorised to rebuild by the Municipal Commissioner. The two bodies the Trust and the Corporation--worked hand in glove; they combined to make us build under penalties. The Trust had no power to make us build up to the new line. The machinery was supplied by the Municipal Commissioner. We were authorised to build by him and whether he authorised us on his own behalf or as agent of the Trust is immaterial. It may be that an irregular procedure was adopted in giving us the order to rebuild: but neither the Trust nor the Corporation can be heard to say that: they are estopped. It is not true that the corporation assented to the building under a mistake as to the ownership of the land: but even if they did it is immaterial.

The land on which we set forward was our own land, subject only to a vesting of the surface for street purposes in the Corporation: it cannot therefore be inferred that there was a right in the Corporation or in the Trust to claim payment. If it be looked upon as a case of one requiring their permission to build on this land, they could have made the payment a condition of such permission under S. 301 (3): this was never done. It would be strange law if there were compulsory vesting *plus* an obligation to pay.

In the first suit we want interest, which we have been refused merely because we declined to pay what was not due for something else. We were entitled to interest as part of the compensation. It is not competent to respondents to object that only the Small Cause Court could deal with the question of compensation. They did not appeal and the suit is now *res judicata.*

(*Sir W. Phillimore.*—It is not really a question of jurisdiction, but whether in the circumstances there was a right of action.)

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1. (1880) 14 Ch Div. 785. 2. (1918) A. C. 364 at p. 379.

P. C.

Ratanlal Choonilal Panalal v. The Municipal Commissioner for the City of Bombay.

Hon. F. Russell, K. C. and *Sheldon* for respondents: This is the first time it has been suggested that the Corporation were aware, when they authorised the building on the set-forward land, that such land was vested in the Trust. It is also the first time it has been suggested that the strip of set-forward land belonged to appellant.

As to the first suit we do not take any point as to jurisdiction, but we contend they are not entitled to interest. Interest can only be recovered in one of three ways—1. by the Law Merchant, 2. by Statute, 3. as damages. S. 301 of Bombay Act III of 1888 gives no right to damages.

(*Sir W. Phillimore.*—Does not "compensation" imply either payment down, or payment later with interest ?)

All they are entitled to is compensation for the value of the land: the Statute does not say, "and damages for delay in paying." Sub-section (4) of S. 301 gives the owner power to go to the Small Cause Court to get the compensation assessed. When the transaction is in the nature of a sale and purchase, arbitrators may have power to award interest, but if there has been a long delay between the date when the money was payable and the proceedings, interest will not be awarded unless that delay is due to the fault of the persons sought to be charged: *Caledonian Railway, Co.*, v. *Carmichael* [1].

There was no sum ascertained until the judgment of the trial Judge: no debt, till the sum was awarded or an offer assented to. It was their own fault they did not get their money long ago.

(*P. O Lawrence, K. C.*—The House of Lords has settled that interest is only payable from the date when possession is taken. (Vide also S. 34 of the Civil Procedure Code, 1908.)

As to the second suit, there was no compulsory impropriation. S. 300 of Act III of 1888 gives no power to anyone to make people build. It only applies when the initial request comes from the owner. The Municipal Commissioners cannot force a man to carry his building up to the "regular line of the street" unless he is rebuilding. Appellant was permitted, not required, to build upon the set-forward land. In substance what was done was done at his request and for his benefit. If he had said, "I want to build upon the street and I won't pay for it," the Corporation could have imposed a payment as a condition to their consent. We say the purchase money is a term or condition of the conveyance under S. 301 (3).

As to title, the strip of land became vested in the Improvement Trust under S. 41 of Act IV of 1908 as part of their property, being

1. (1870) 2 Sc. App. 56.

P. C.

Ratanlal Choonilal Panalal v. The Municipal Commissioner for the City of Bombay.

land which under S. 31 they thought was required for the scheme. Under S. 45 (2) the land constituting Princess Street revested in the Corporation, leaving this strip vested in the Trust, which is a permanent body with power to hold lands. Nothing has ever taken away this strip from the Trust.

(*Lord Shaw.*—The policy of the Statute is to transfer to the Trust the soil of the street, and when the street is made to revest it in the Municipality. It would be inconvenient to have these little strips all over Bombay belonging neither to the inhabitants nor to the Municipality).

There is no clashing of jurisdictions. The duty of the Municipality is to maintain the street. The whole thing is worked out in S. 63, where powers to hold land are given not to the Corporation, but to the Board—vide also S. 64.

(*Mr. Ameer Ali.*—It is suggested that the Trust only holds land for a specific purpose. The Statute says, "for the purposes of the Act.")

Those purposes are numerous. The strip vested in the Trust under the Act, and the Act does not say it vested only for a particular purpose.

(*Lord Shaw.*—But S. 41 is limited. This strip has never been included in a street.)

When the notification was issued the strip was part of a street, "to be formed." The words "the part required" do not mean *de facto* required: when the street is formed the Corporation gets the formed street and nothing else: the rest remains vested in the Trust.

(*Sir W. Phillimore.*—I suggest that Ss. 41 and 45 stand together. It is not contemplated there shall be any extra strip: you are to have only the land actually required for the street. I don't see how the Trust can be heard to say that this is land which they have taken under S. 41, but which does not go to the Corporation under S. 45.)

It was land which the Trust thought they would want—vide S. 31.

(*Sir W. Phillimore.*—That does not affect S. 41. A short method is provided of acquiring, by a mere notice, certain lands, but you get that land only if it is really wanted. The method is confined to land which you require as part of the street if you don't require it as that, you may get possession but you don't get property.)

S. 31 provides the scheme. "Included" in S. 41 means included in the scheme—included in the site of a street to be formed at the date of the notice. Everything turns on the *bona fide* inclusion of the site in the original scheme. S. 41 deals with a street to be formed: S. 45 with a street actually formed: they are not correlative.

P. C.

Ratanlal Choonilal Panalal v. The Municipal Commissioner for the City of Bombay.

There is no general rule that a vesting clause vests property only *sub modo*: it is a question of the construction of the particular Act. In *Rolls* v. *St. George's Vestry* [1] the words construed were "streets being highways". Here the Act vests the land in the Corporation absolutely. S. 289 may leave the matter doubtful, but S. 290 is clear.

(*P. O. Lawrence.*—Referred to *Bombay Corporation* v. *G. I. P. Railway* [2].)

That case was decided on totally different grounds. What Lord Haldane said on the point as to vesting is ambiguous and anyhow was only *obiter dictum.*

Sheldon followed: The City of Bombay Improvement Board was constituted in 1898 for purposes set out in the preamble of Act IV of 1898. They are accountable as a public body for this strip of land: if they let it go to the Municipal Corporation they would be surcharged by the Auditor-General.

P. O. Lawrence replied.

Their Lorships' judgment was delivered (July 26, 1918) by

Lord Shaw.

Lord Shaw.—These are consolidated appeals from two decrees of the High Court of Judicature at Bombay, dated the 16th April, 1916, confirming decrees which are dated the 15th October, 1914, in two suits which were instituted in its original jurisdiction.

The object of the suit by the respondents, the Trustees for the Improvement of the City of Bombay, against the appellant, is for a declaration of the plaintiffs' property in a certain piece of land, and for the ejectment therefrom of the defendant, the present appellant, and for delivery forthwith by him of possession thereof. The land has been built over. The issue raised is serious, affecting as it may do many other frontage sites in Bombay.

The position of the block of property (of which the piece just mentioned forms a part) is as follows:—It is a corner site having one frontage to the east—Kalbadevi Road, the other frontage to the north—to Princess Street, in the City of Bombay. Princess Street is made on the site of what was formerly Lohar Chawl Street. The piece of land from which the appellant is sought to be ejected faces Princess Street.

1. (1880) 14 Ch. D. 785.
2. (1916) L R 43 I A. 310=I. L R. 41 Bom. 291

P. C.

Ratanlal Choonilal Panalal v. The Municipal Commissioner for the City of Bombay.

Lord Shaw.

The primary question for the consideration of the Board is,— who owns that piece of land ?

The plaintiff, Ratanlal Choonilal Panalal, is the proprietor of the corner block of ground. In the year 1906 his mother and natural guardian, he being then an infant of 9 years of age, wished to develop the property by erecting certain new buildings thereon. Steps were accordingly taken to give the notices required in the circumstances to the Corporation. No question arises as to the regularity of these proceedings. Building lines had been drawn up for the streets of Bombay by the Municipal authorities under statutory powers, and in the course of disposing of the application to put down the new buildings on the corner block in question, orders or requirements were issued that these lines should be conformed to.

With regard to the east frontage, namely, that to Kalbadevi Road, the order required that the line of new buildings to be erected should be set back. This was done. This involved the sacrifice to the owner of 28·41 square yards of site. It is admitted by the respondents that the Corporation must pay for this ground under the Bombay Act No. III of 1888.

With regard to the frontage to Princess Street formerly Lohar Chawl Street, it was required of the plaintiff not that he should set back his building line, but that that line should be carried forward. This also was done and the buildings were erected, according, in all respects, to the requirements made and to plans which were submitted to and sanctioned by both the authorities, namely, the Corporation and the Improvement Trust. Details of these points need not be given : the real facts are admitted.

The attitude of the Corporation appears to be that the one of these transactions is a legitimate set-off in law against the other. In this they are supported by the Bombay Improvement Trust, which puts forward the claim that it, under its Act of constitution, is the owner of that projecting piece of ground facing Princess Street, which had to be so to speak absorbed into the block so as to comply with the throwing forward of the building line. This would seem to be an answer to the plea of set-off, as the debt due by the Corporation could not be compensated in respect of a claim by the Improvement Trust.

P. C.

Rantanlal Choonilal Panalal v. The Municipal Commissioner for the City of Bombay.

Lord Shaw.

But these two authorities are hand and glove, and this not improperly. It is in the public interest that they should work together, if this can be done in conformity with the various Statutes. The mode of co-operation adopted in the present case was somewhat unusual. The Corporation, claiming as owner, made a demand to be paid a price for the site fronting Princess Street over which the appellant had been forced to throw his building forward so as to conform with the required building line. At first there was an inclination to consider that demand; but differences, delays, and further enquiry ensued, and finally the plaintiff refused this demand. Thereupon the Trust instituted their suit, craving *inter alia* ejectment of the plaintiff. This, if decreed, would of course mean the total destruction of a large and important section of the plaintiffs' buildings, all erected according to plan and by the sanction and with the knowledge of the Corporation and Trust as stated.

This situation involves an investigation as to the important and fundamental question already stated, namely, who owns this piece of ground? Unless the Improvement Trust can establish its ownership of the site of the projection in question, namely, that facing Princess Street, it cannot of course have any title to eject the plaintiff therefrom.

By the City of Bombay Improvement Act, No. IV, 1908, the respondents as a Board of Trustees were constituted. Among its powers are those of making street schemes, and by Section 1 it is provided that the street scheme "shall within the limits of the area comprised in the scheme provide for (*a*) the acquisition of any land which will in the opinion of the Board be necessary for or affected by the execution of the scheme; (*b*) relaying out all or any land including the construction of buildings and the formation and alteration of streets."

It is admitted that LoharChawl Street was in 1905 vested in the Corporation. The Trust state in their plaint that on the 17th January, 1905, they intimated to the Corporation that that street so vested in it was required by the plaintiff to form part of Princess Street, a street which was then about to be formed by the Trust under a scheme to be carried out by it as provided for by the City of Bombay Improvement Act. The meaning

P. C.

Ratanlal Choonilal Panalal v. The Municipal Commissioner for the City of Bombay.

Lord Shaw.

of this is that, to begin with, the Trust took over Lohar Chawl Street just as it found it.

This was two years before the appellant began to build. In point of fact, he began in February 1907; and he began upon lines prescribed by the Corporation, and known and approved by the Trust as so prescribed. His building line did *de facto* project over the old line of Lohar Chawl Street and come forward to a new line arranged by the authorities as that upon which Princess Street was to run.

How had this change from the old frontage of Lohar Chawl Street to a new frontage for Princess Street occurred? It had occurred for the simplest of all reasons, namely, that between 1905 and 1907 the Trust in working out its scheme of reconstruction, discovered that it would be more advantageous to run the line of Princess Street so as to carry it forward at certain portions, of which the bit of site in question is one, and to carry it back at other portions. The Trust accordingly communicated that new Princess Street line to the Corporation, sending a plan showing exactly the new and forward regular building line. To that line the Corporation officers duly worked, and to that line the appellant was ordered, most properly, to conform. And, most properly, he did so. In obedience to this requirement the buildings were erected, and they conformed exactly with the forward frontage demanded. As Mr. Delves, the Trust's deputy land manager, testifies—

"The Trust officers knew that the defendant's building was being constructed on this set-forward land. . . . . The Trust took no objection to the construction of the defendant's building while the building work was going on. . . . . The Trust never claimed nor thought of claiming the set forward land back from the defendant till the Municipality asked us to do so."

It was in these circumstances that the suit for ejectment of the plaintiff was brought by the Trust, upon the averment that in 1907 his mother "unlawfully entered into and took possession thereof." This is how the matter stands in fact. How it stands in law depends upon the claim which the Trust puts forward and asks to be judicially declared, that the piece of land "is the property of and vested in it." This claim in law will now be examined.

As stated, the history of the buildings has been that they have been erected to conform to requirement, upon the new and forward Princess Street line and not upon the old Lohar

P. C.

Ratanlal Choonilal Panalal *v.* The Municipal Commissioner for the City of Bombay.

Lord Shaw.

Chawl Street line. The question is, what is the fate of the property between these two lines? The Trust maintains that when it gave its original intimation to acquire up to the Lohar Chawl Street line the effect of that was to vest in the Trust all the ground so embraced, that is to say, not only the ground on which Princess Street was in fact formed, but also the strips on which it was not formed. The municipality for the purposes of this litigation appears to acquiesce in this view, and the learned Judges in the Courts below agree. In the opinion of the Board this is a mistake.

The effect of the mistake would be to produce in the City of Bombay an extraordinary situation. Many properties fronting ordinary streets belonging to the Corporation would find themselves frontaging property belonging to the Trust by virtue, it is contended, of the mere intimation that the Trust required the old street for making the new. But when the new street came to be constructed it would be within the power of the Trust to throw the new and actual building line forward with the result that not only would it become the owner of the street as ultimately formed, but it would also become *de facto* the owner of all the strips between the line of the old street and the line of the new. All the frontagers so situated in Bombay would consequently and *de jure* be put into the position of owning hinterland instead of frontage land and be subject to the disadvantages for commercial and other purposes of all that this implies. It was contended by the learned counsel for the respondents that legally and logically the Trust being the owner of these strips it could do with them what it liked with the assent of the Corporation, that is to say, it could let them or build upon them as its own property, thus "blinding" all the old frontagers' sites and buildings.

It is accordingly necessary to see what actually is the true extent of the powers of the Trust on this topic. These are contained in the City of Bombay Municipal Act No. III of 1888, which gave certain powers to the Corporation, which powers were by S. 42 of Act IV of 1898 declared to "apply to streets or parts thereof which may become vested in the Board under this Act during such period as the same shall respectively remain so vested and for the purposes of this Act." The language of this section reflects pretty clearly the main object

P. C.

Ratanlal Choonilal Panalal v. The Municipal Commissioner for the City of Bombay.

Lord Shaw.

of the Statute, which was to set up with sufficient powers a street-making authority, and, when its function as such was expired, to have the street which had been reconstructed or made by the Trust thereupon handed back to the Corporation.

By S. 41 it was provided as follows :—

"Whenever under any improvement or street scheme the whole or any part of an existing public street or other land vested in the Corporation is included in the site of any part of a street to be formed, altered, widened, diverted, raised, rearranged, or reconstructed by the Board, the Board shall give notice to the Commissioner that the whole, or a part as the case may be, of such existing street or other land (hereinafter called the 'part required') is required by them as part of a street to be dealt with as aforesaid, and the part required shall thereupon, subject to the provisions of sub-S. (2) of S. 45, be vested in the Board; provided that nothing in this section contained shall be deemed to affect the rights or powers of any Municipal authority under Chapters IX and X respectively of the Municipal Act in or over any Municipal drain or water-work."

By S. 45 (2) it was provided that "the Commissioner shall on being satisfied that any street formed by the Board has been duly levelled, paved," etc., and drained and lighted, and, in short, thoroughly completed and the work of the Trust as a street-making authority finished, then "such street shall thereupon vest or revest, as the case may be, in the Corporation, and the Corporation shall thenceforward maintain, keep in repair, light, and cleanse such street."

Not a word is said in these sections to indicate either (1) that the building line of the street must, once indicated, remain by reason of that original indication, and not be open to change or putting forward should experience suggest this to be for the best; nor (2) is anything said to indicate that the street taken over "to be formed" is anything different in dimensions from the street to be handed back when formed.

Upon the first point the Bombay Act No. III, and no doubt the practice of the municipality thereunder confute it. The section referred to is as follows :—

"297 —(1) The Commissioner may—

(a) Prescribe a line on each side of any public street;

(b) From time to time, but subject in each case to his receiving the authority of the Corporation in that behalf, prescribe a fresh line in substitution for any line so prescribed, or for any part thereof.

* * * * *

"(2) The line for the time being prescribed shall be called 'the regular line of the street.'"

P. C.

Ratanlal Choonilal Panalal v. The Municipal Commissioner for the City of Bombay.

Lord Shaw.

It cannot be suggested that the Trust were, as compared with the municipality prohibited from "prescribing a fresh line."

As to the second point, their Lordships are clearly of opinion that these two sections, the one as to taking over a street "to be formed," and the other as to handing the formed street back are correlative to each other. The section does not mean merely "intended to be formed" when a notice is made, but it refers to that ground and no other which is used as a street and for the purposes thereof, and that no transfer from the municipality is effected to the Trust of anything else. If, therefore, a line originally indicated is changed, the line of the street to be formed is changed and the whole transaction is modified in this sensible and practical manner. It is only in this way that the word "revest" in the Corporation becomes intelligible. What is to revest in the municipality is just that which when formed as a street had been the subject of that interim divestiture to the Trust as the street forming authority. And the whole theory of the Trust's case namely, that in virtue of a notice taking over from the municipality a certain street of Bombay to be formed as a new street by the Trust, thereby vested the whole of the old street in it, although a strip of the old street never was formed as a new street, falls to the ground.

The Trust's action was—in conjunction with that of the officers of the municipality—much more reasonable, namely, that when the line of the new street was made the frontager was required to put forward his building to conform to it. And this, in the opinion of the Board, was not only reasonable in practice but was correct in law and in accordance with a sound construction of the Statutes.

What then happened to the strip of old street which was never "formed" into the new street? The answer is that nothing happened to it. It remained under the jurisdiction, and in all respects as before the property of the municipality. To it as such accordingly when the frontager was required to put forward his buildings over it the third sub-section of S. 301 of the Municipal Act of 1888 expressly applies It is as follows :—

"(3) If the additional land which will be included in the premises of any person required or permitted under the last preceding section to set forward

P. C.

Ratanlal Choonilal Panalal
v.
The Municipal Commissioner for the City of Bombay.

Lord Shaw.

a building belongs to the Corporation, the order or permission of the Commissioner to set forward the building shall be a sufficient conveyance to the said owner of the said land; and the terms and conditions of the conveyance shall be set forth in the said order or permission."

The result is plain : the projection, that is to say, the site between the old street line and the new, *ex adverso,* of the appellant's property, became his in ownership. It is his now. The title of the trust to it fails, and with it fails the suit, whether for declaration or ejectment.

There remains to be dealt with the suit by the appellant for the price of the ground taken from him as the result of the compulsory throwing back of his line of building facing Kalbadevi Road and the absorption into that road by the municipality of a portion of appellant's ground. Payment for this has been decreed and the decree in this respect will stand.

But two further questions arise in regard to that suit, *viz.,* as to costs and to interest on the price.

Costs were refused on account of the view entertained in the Courts below as to the conduct of the appellant in refusing to set off against that price a price for the Princess Street projection. The question of whether a price is exigible for that projection does not arise directly as matter of suit; but it is necessary to express an opinion upon it because a determination upon it will govern the questions both of costs and of interest.

In the opinion of the Board while the Act makes provision for the compulsory expropriation of an owner, it makes no provision whatever for a payment by the owner in respect of what may be termed compulsory impropriation. Some reasons occur for the view that it might have been so, and some occur for an opposite view. These were for the legislature. What the legislature has done, and all that it has done upon that subject, is contained in S. 310 (2) of the Municipal Act. It is as follows :—

"(2) If, in consequence of any order to set forward a building made by the Commissioner, ... the owner of such building sustains any loss or damage, compensation shall be paid to him by the Commissioner for such loss or damage."

Such loss or damage may be easily figured : the compulsory projection may involve most serious cost; the whole founda-

P. C.
Ratanlal Choonilal Panalal v. The Municipal Commissioner of the City of Bombay.
Lord Shaw.

tions of the old building may be rendered useless, and the cost of new may be heavy; alterations of plans, levels, elevations, and the like might all be involved in particular cases, and, in short, the Legislature has recognised, not a price to be paid by the owner for compulsory impropriation, but damages to the owner if such can be qualified in consequence thereof. Their Lordships in these circumstances cannot look upon the suggested right in the Trust or the Municipality to receive a compulsory price for the Princess Street proprietors to be justified by the Statute. Accordingly, the alleged right or duty of set-off fails.

In these circumstances the plaintiff and his advisers were, of course, entirely warranted in refusing to concede the set-off claimed. It was not, in the opinion of the Board, justified by law. This renders it unnecessary to deal in detail with certain derogatory observations, more particularly by Davar, J., culminating in his assertion that the appellant's conduct "has been conspicuously unscrupulous and transparently dishonest." When it is remembered that in all the most important of these transactions the appellant was an infant of 9 years of age, the suggestion of such precocity in wickedness in Bombay seems sufficiently answered. But it may suffice to say that, hard to bear as these accusations must have been, they do not appear to their Lordships to have been in any respect warranted by the facts or by the law of either case. In the opinion of the Board the position taken up by the appellant in these suits has been completely justified, and was throughout in accordance with law. Costs will accordingly follow the event.

On the point of interest, on the price payable by the municipality, two matters were agreed at the bar. In the first place, the rate of interest, should it be allowed, was arranged at 6 per cent. In the second place, it was agreed that the municipality has been in possession of the ground since the 30th June, 1909.

The Board is of opinion that the right to interest depends upon the following broad and clear consideration. Unless there be something in the contract of parties which necessarily imports the opposite, the date when one party enters into possession of the property of another is the proper date from which interest on the unpaid price should run. On the one

P. C.

Ratanlal Choonilal Panalal *v.* The Municipal Commissioner of the City of Bombay.

Lord Shaw.

hand, the new owner has possession, use, and fruits; on the other, the former owner, parting with these, has interest on the price. This is sound in principle, and authority fully warrants it See especially Sir W. Grant's judgment in *Fludyer* v. *Cocker,* 12 Vesey Jn. 25, and also see *Greenock Harbour Trustees* v. *G. & S. W. Railway,* 1909, Sess. Cases, p. 50, in which the judgment of Lord Cowan in *Re Stirling & Dunfermline Railway Company,* 19 D. 598, is adopted. Also *Birch* v. *Joy,* 3 H. L. 565, in the judgment of Lord St. Leonards at p. 590.

Their Lordships will humbly advise His Majesty that the appeals be allowed, and that in the first suit the decrees appealed from be varied, and that a decree pass n favour of the appellant for the sum of 5,682 rupees brought out in the judgment of date the 15th October, 1914, with interest thereon at the rate of 6 per cent. per annum from the 30th June, 1909, until payment; and that further in the second suit the judgment and decree be recalled, and that that suit stand dismissed; the appellant to have his costs in both suits, here and in the Courts below.

Solicitors for Appellant :—*T. L. Wilson & Co.*

Solicitor for Respondents :—*Cameron Kemm & Co.*

A. P. P.

PRIVY COUNCIL.

PRESENT:—LORD SHAW, SIR JOHN EDGE, MR. AMEER ALI, AND SIR WALTER PHILLIMORE, BART.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Mohant Paramanandra Das Goswami and others. ... *Appellants.**

v.

Kripasindhu Roy and others ... *Respondents.*

P. C.

Mohant Paramanandra Das Goswami *v.* Kripasindhu Roy.

Orissa Land Law—Khurdah Estate—Sarbarakars—Sarbarakari jagirs—Whether they are heritable and transferable.

Sarbarakars of the Khurdah Estate in Orissa have no heritable or transferable right in their office of Sarbarakar or in jagirs held by them as Sarbarakars. They are liable to be dismissed for misconduct, and on such dismissal lose all right to occupy the Sarbarakari jagirs. On the termination of a settlement they are bound to enter into a fresh engagement with Government (or with the grantee, when Government has made a grant), otherwise they l se their office.

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* 20 and 21st June, 1918.

P. C.

Mohant Paramanandra Das Goswami v. Kripasindhu Roy.

In 1861 Government granted certain mouzas in Khurdah revenue free, but subject to the engagement of the then Sarbarakar (defendant's father) with themselves for the settlement period then current. On the completion of a fresh settlement in 1899 the defendant, who had succeeded his father as Sarbarakar, was called on by the grantee to execute the usual ekrarnama, but refused to do so He set up a claim that he was a tenure-holder, and misappropriated the rents which he collected. Plaintiffs thereupon dismissed him and brought this suit to recover the Sarbarakari chakran lands in his possession :

Held, that defendant was not a tenure-holder, that his position under the grantee was the same as that of a Sarbarakar under Government, that he had been rightly dismissed, and that plaintiffs were entitled to eject him from the Sarbarakari jagirs.

Appeal from two decrees of the Calcutta High Court, dated the 4th June 1913, modifying a decree of the Subordinate Judge of Cuttack.

Plaintiffs sued on the allegations that they were proprietors of certain mouzas in Orissa formerly part of the Khurdah Khas mehals which were granted them in 1861 subject to the engagement with Government of the then Sarbarakar : that defendant No. 1, who had succeeded to his father as Sarbarakar since that date, was merely an office holder and was liable to dismissal for misconduct during the currency of a settlement and had no right of renewal of his appointment at the end of a settlement : that in 1899, when a new settlement was made, he refused to comply with their demand to execute a kabuliyat as Sarbarakar that they dismissed him, but that he claimed to be a tenure-holder and collected rents from the tenants and misappropriated them. They prayed that he be ejected.

First defendant contended that he and his ancestors were tenure-holders not liable to dismissal or summary ejectment.

The Subordinate Judge held that plaintiffs were proprietors of the villages in suit, that first defendant was not a tenure-holder and was liable to dismissal and had been rightly dismissed. He decreed the suit. On appeal, the Calcutta High Court (Chitty and Teunon, JJ.) reversed this decision and dismissed the suit, holding that first defendant was a tenure-holder. Hence this appeal.

De Gruyther, K. C. and *Parikh* for appellants : There are concurrent findings that plaintiffs are owners of the villages in suit. The onus lies on defendant No. 1 to prove he is a tenure-holder thereof. In the Record of Rights prepared during the last settlement he is not shown as a tenure-holder. He admits he knew this, and says he applied to be recorded as

P. C.

Mohant Paramanandra Das Goswami v. Kripasindhu Roy.

a tenure-holder but never learnt the result. The presumption is that he is not a tenure-holder : Bengal Tenancy Act, 1885 (Act VIII of 1885) Ss. 101, 102, 103, 103A. He is a Sarbarakar and his position is the same as that of a Sarbarakar in the Khas mehal. He was liable to dismissal for misconduct and was bound to execute a fresh Kabuliyat on completion of the last settlement in 1899. He was not entitled as of right to a renewal of his appointment, nor was he entitled to collect rents from the tenants. The plaintiffs were justified in dismissing him. (Reference was made to the "Selections from the correspondence on the settlement of the Khurdah Estate in the District of Puri", Volumes I and II.)

H. N. Sen, for respondent No. 1 : Sarbarakari tenures in Cuttack are permanent, hereditary, and transferable :

Saddananda Maiti v. *Nowrattam Maiti*, [1].

He referred to Hunter's Orissa, Vol. 2, pp. 63-68, 222-228, 258, 261, 265 : Toynbee's History of Orissa from 1803 to 1828, p. 24 and appendix. pp. 100 and 169 : Baden-Powell's Land Revenue in British India, p. 173 : and the Orissa Tenancy Act, 1913 (Act II of 1913) S. 15 (1).

De Gruyther, K. C. replied.

Their Lordships' judgment was delivered (July 26, 1918) by

Sir John Edge.

Sir John Edge.—This is an appeal against two decrees, dated the 4th June, 1913, of the High Court at Calcutta, which modified a decree, dated the 22nd March, 1909, of the Court of the Subordinate Judge of Cuttack.

The suit in which this appeal has arisen was brought in the Court of the Subordinate Judge of Cuttack by the appellants on the 5th October, 1907.

The plaintiffs, who are the appellants here, claim to be, with the defendants Lakimani Ama and Bhagabat Deb Thakur, proprietors of revenue free lands in Orissa. Kripasindhu Roy, who will be in this judgment referred to as the first defendant, is the principal defendant. The plaintiffs claim a declaration that the lands in dispute in this suit are their free behali lands held and enjoyed by the plaintiffs and the defendants Lakimani Ama and Bhagabat

1. (1871) 8 Ben. L. R. 280.

P. C.

Mohant Paramanandra Das Goswami v. Kripasindhu Roy.

Sir John Edge.

Deb Thakur ; a declaration that except the share of 11 gandahs, 3 karas, 7 dantis, 10 biswas, 9 gandahs, 1 kara of the Darpanarayan Math purchased by the first defendant, he has no right to the share of 15 annas, 8 gandahs, 1 danti, 5 biswas, 10 gandahs, 3 karas of the lands in dispute ; a declaration that 57·892 acres of land mentioned in schedule (Kha) of the plaint is the Sarbarakari chakran jagir land appertaining to the properties in suit, and that the first defendant has no right of occupancy in 30·045 acres of land mentioned in schedule (Kha) ; a decree of ejectment against him from the disputed lands mentioned in Schedules (Ka) and (Kha) ; mesne profits ; an account of moneys received by him as Sarbarakar from 1306 to 1308 Fasli ; and any other relief to which the plaintiffs might be found to be entitled.

It was alleged in the plaint that the first defendant held the lands from which it was sought to eject him by virtue of his office as a Sarbarakar in the service of the plaintiffs and their co-sharers, who are Mathdharis, to whom or their predecessors the Government had granted in 1861 five mowzahs of Garh Atiri in Khurdah revenue free, in lieu of an annual allowance of salt theretofore made by the Government to the Mathdaris. The five mowzahs were Bande, Koranga, Sardhapore, Atiri and Chutipalang. It was alleged by the plaintiffs that it was the duty of the first defendant as Sarbarakar to collect the rents due from occupiers of lands of the plaintiffs, to account for moneys received by him as the Mathdharis' Sarbarakar and for disbursements, and that he was liable to dismissal from his office for misconduct. It was also alleged by the plaintiffs that the first defendant, in right of his office of Sarbarakar, was entitled to apply to his own use 20 per cent. of the rents received by him from the lands of the Mathdharis, and to hold certain revenue-free grants of land known as Sarbarakari jagirs. Some of the Sarbarakari jagir lands which were held by the first defendant as a Sarbarakar of the Mathdharis were in Mowzah Bande which had been granted to the Mathdharis by the Government in 1861, other Sarbarakari jagir lands which were held by him as Sarbarakar of the Mathdharis were in Mowzah Panasabasta, which had not been granted to the Mathdharis. It was alleged in the plaint that after the settlement which was completed in 1899 the first defendant, having

P. C.

Mohant Paramanandra Das Goswami v. Kripasindhu Roy.

Sir John Edge.

been called upon by the Mathdharis to execute an ekrarnama as Sarbarakar and directed by the Mathdharis to collect as their Sarbarakar the newly assessed rents of their lands, and to pay the same to the Mathdharis, did not execute the customary ekrarnama, and assuming to be himself the proprietor of the Mathdhari lands collected rents from the tenants of those lands and misappropriated the same and that in consequence of such misconduct the Mathdharis dismissed him from his office of Sarbarakar. It was also alleged in the plaint that the first defendant had dispossessed the plaintiffs.

By his written statement the first defendant denied all the material averments contained in the plaint; he denied the title of the plaintiffs, and alleged that the plaintiffs' claim was false and fraudulent, and that he was a tenure-holder of the lands of the Mowzahs from which the plaintiffs sought to eject him and held the jagir lands in his own right, and denied that he was liable to dismissal from his office of Sarbarakar.

The Subordinate Judge of Cuttack found on the evidence that the first defendant was not a tenure-holder of the Mowzahs in suit; that he was a Sarbarakar liable to be dismissed from his office for misconduct, and that by his acts he had dispossessed the Mathdharis, and had been dismissed from his office of Sarbarakar; that 30·045 acres of the 57·892 acres mentioned in Schedule (Ga) of the plaint were rayati lands, and that 27·847 acres, remainder of the 57·892 acres, were Sarbarakari jagir lands which were liable to resumption on the dismissal of the first defendant from his office of Sarbarakar. The Subordinate Judge found that 19·677 acres of the 27·847 acres were in Mowzah Panasabasta He dismissed the claim for an account as time barred: he reserved the ascertainment of mesne profits; and he found that the plaintiffs were entitled to a declaration of their revenue-free title to the Mowzahs in dispute. The Subordinate Judge gave the plaintiff's a decree declaring their proprietary right to the share which they claimed in the Mowzahs in dispute; decreed that the plaintiffs and the defendants on whose behalf they claimed should be jointly put in Khas possession of those Mowzahs, with the exception of 30·045 acres, which he had found were rayati land.

"If the defendant No. 1 (the first defendant) as a Sarbarakar, as found in the judgment, do not in two months execute a kabuliyat in their favour, agreeing to pay annually the sum total of the rents assessed on tenants as per khatians

P. C.

Mohant Paramanandra Das Goswami *v.* Kripasindhu Roy.

Sir John Edge.

prepared during the last settlement, deducting 20 per cent. thereon, *minus* the rent payable in respect of the jagir land in his possession, for a term expiring with that of the present settlement. . . . . If the defendant No. 1 execute the kabuliyat within the time allowed to him, the plaintiffs will not have Khas possession of the Mowzahs in suit."

From that decree the plaintiff's and the first defendant respectively appealed to the High Court at Calcutta.

As stated in the judgment of the High Court, the case of the plaintiff's as argued on the appeal was that the first defendant, his father and grandfather before him were mere officers or servants, first of the Gevernment, then of the Mathdharis, liable to dismissal for misconduct during the currency of a settlement, and having no right to any renewal of their appointments at the close thereof.

"They, therefore, sued for the ejectment of defendant No. 1 (the first defendant) from the 2½ mowzahs in suit, and also from the jagir lands recorded in villages Bande and Panasabasta."

As stated in that judgment the first defendant—

"On the other hand, contends that he and his ancestors were and are tenure-holders, not liable to dismissal or summary ejectment. and that he held the jagir lands in Bande and Panasabasta as Dalabehara, and as Sarbarakar."

The learned Judges on the appeals considered historically the position of Sarbarakars in Khurdah, from the insurrection in 1817 of Jagabandhu Mahapatra, the hereditary Bukshi or commander of the forces to the Raja of Khurdah, down to the present time, and relied mainly for the information on which they acted on the "Selections from the correspondence on the settlement of the Khurdah Estate, in the district of Puri" (volume I published in 1879, volume II published in 1881).

The Mowzahs which were in 1861 granted revenue free to the Mathdharis were in and prior to 1818 and thence until 1861 Khas Mahals in proprietary possession of the Government, by whom the Sarbarakars were appointed. It is not necessary for their Lordships to refer to all the reports and papers contained in the "Selections," to which their attention has been drawn at the hearing of this appeal. They will refer to those of them only which they consider to be the most important.

Mr. Forrester, who was the Deputy Collector in special charge of Khurdah, in his report of the 17th October, 1819, on the then settlement, stated that he had in general admitted as Sarbarakars the persons who had entered into engagements at

P. C.

Mohant Paramanandra Das Goswami v Kripasindhu Roy.

Sir John Edge.

the preceding settlements, and had reverted to the rates fixed for the different classes of land in the different villages by Gholam Kadir in 1806, that the Sarbarakars were bound by their engagements to adhere to those rates, and not to charge more than 4 annas per man on new cultivation, and they had no proprietary right in their villages. ("Selections," vol. I, p. 105.) Mr. Forrester also in his report referred to the general resumption of jagir lands after the rebellion of Raja Makunda Deo and his followers. The Governor-General in Council confirmed Mr. Forrester's settlement, which was for a term of years.

Mr. Wilkinson, who had succeeded Mr. Forrester in charge of Khurdah, in a report of the 24th October, 1836, on a settlement which he had made, stated that he had—

"Taken from the old Sarbarkars engagements for the payment of the aggregate of the raiyati rents, 20 per cent. in lands and money, and that in this 20 per cent he had included the assessed or estimated rents of the jagirs reserved for Delabeharas and Dalais by Government order."

He added that the Delabeharas were removable for miscoduct and claimed no proprietary rights ("Selections," vol. I., p. 133). On the 22nd Angust, 1837, the Government confirmed that settlement of Mr. Wilkinson, and stated its agreement with Mr. Halliday, then member of the Board of Revenue—

"That neither the engagements (of the Sarbarakars) with Government nor, of course, the lands by which the service rendered is remunerated, should be matters of inheritance and liable to sub-division among heirs." ("Selection," vol. I, p. 136).

The orders of the Government were on the 15th September, 1837, forwarded by the Board of Revenue to the Commissioner with the following instructions :—

"You will cause it to be distinctly notified to the Sarbarakars that at the expiration of the present settlement Government will select its own engager, wherever they may choose to exercise the right so to do, and that the present incumbents will be held liable to dismissal for default or bad behaviour satisfactorily proved before the local authorities. It is very desirable that in all future cases individuals only should be acknowledged and allowed to treat as Sarbarakars." ("Selections," vol. I, p 133.)

In his report to the Board of Revenue of the 5th October, 1880, Mr. Metcalfe, then Commissioner of Orissa, stated in relation to Khurdah :—

"The Government revenue of Khurdah has hitherto been collected by (1) sarbarakars proper, (2) by pursethis, and (3) by reportdars.

"The first enjoy jagir lands, and enjoy rents of lands brought under cultivation during the period the settlements runs.

P. C.

Mohant Paramanandra Das Goswami v. Kripasindhu Roy.

Sir John Edge.

"The second are Sarbarakars of homestead lands, who as a rule, do not enjoy jagir lands.

* * * * *

"No one of the three classes has any proprietary or hereditary rights." ("Selections," vol. II, p. 258)

The reports and papers in the "Selections" from the correspondence relating to the settlements in Khurdah have satisfied their Lordships that Sarbarakars in Khurdah had under the Government no heritable or transferable right in their office of Sarbarakar or in the Sarbarakari jagirs; that they were liable to be dismissed for misconduct, and that on dismissal they lost all right to occupy any Sarbarakari jagirs; and that on the termination of a settlement they were bound to enter into a fresh engagement with the Government if they wished to be continued in the office of Sarbarakar. When the Government in 1861 granted the Mowzah revenue free to the Mathdharis a settlement had in 1857 been made, and the Sarbarakars including the first defendant's father, Brindaban, had entered into engagements by Kabuliyats with the Government for the period of the settlement, and the grant to the Mathdharis was subject to those engagements of the Sarbarakars. That settlement terminated in 1880. Brindaban died in 1889. The statements in the suits in which Brindaban was concerned, which are referred to in the judgment of the High Court, do not alter the conclusions as to the position of Sarbarakars in Khurdah which are to be drawn from the reports and papers in the "Selections."

The High Court came to the conclusion that it was clear that from 1818 onwards the tendency of the Government and of the majority of its officers was to regard the Sarbarakars in Khurdah as mere office holders, and that in practice their position was hereditary. The High Court held that the first defendant was a tenure-holder, and by its decree in the appeal in which the plaintiffs were the appellants dismissed their apeal. In the appeal in which the first defendant was the appellant the High Court by its decree affirmed the decree of the Subordinate Judge, in so far as it declared the plaintiffs' title as proprietors of the two and half mowzahs in suit; declared that the first defendant was a tenure-holder; and in other respects set aside the decree of the Subordinate Judge and dismissed the suit.

P. C.
Mohant Paramanandra Das Goswami v. Kripasindhu Roy.
Sir John Edge.

On the hearing of this appeal counsel for the first defendant contended that the decision in 1871 of the High Court at Calcutta in *Saddanando Maiti* v. *Nowrattam Maiti and others* (8 Bengal Law Reports, 280), was an authority which showed that Sarbarakari tenures in Cuttack are permanent, hereditary, and transferable. Apparently that decision was not brought to the attention of the Subordinate Judge or of the High Court in this case, possibly because it does not appear that the lands the rent of which was in that case sought to be enhanced were situate in Khurdah ; possibly because it does not appear on what finding of the Court of First Appeal or on what evidence, if there was any, as to the position of Sarbarakars in Cuttack the High Court came to the conclusion that Sarbarakari tenures in Cuttack were permanent, hereditary, and transferable. That case before the High Court was a second appeal.

Their Lordships agree with the Subordinate Judge that the first defendant was not a tenure-holder ; that he was liable to be dismissed for misconduct from his office of Sarbarakar ; that he was rightly dismissed from that office ; and that on his dismissal he ceased to be entitled to hold the Sarbarakari lands in Mowzah Bande ; and that except as to the Sarbarakari lands in Mowzah Panasabasta, the plaintiffs were entitled to the decree in ejectment and for possession, and to the declaration of title which the Subordinate Judge by his decree gave to them.

The plaintiffs have failed to prove any title in them to the jagir lands in Mowzah Panasabasta.

Their Lordships will humbly advise His Majesty that this appeal should be allowed ; that the decree of the High Court in the appeal in which the plaintiffs were the appellants should be set aside with costs ; that the decree of the High Court in the appeal in which the first defendant was the appellant, except in so far as it affirmed the declaration of the Subordinate Judge, of the title of the plaintiffs as proprietors of the the 2½ Mowzahs in suit, should be set aside with costs ; and that the decree of the Subordinate Judge should be affirmed so far as it declared the proprietary title of the plaintiffs to the 2½ Mowzahs in suit ; that it should be varied by decreeing the ejectment of the first defendant from possession of the jagir lands in Mowzah Bande, but not from the jagir lands in Mowzah Panasabasta, by decreeing mesne profits to be ascertained in the Court of the

Subordinate Judge; and by striking out of that decree the clause giving to the first defendant an opportunity of executing a kabuliyat in favour of the plaintiffs; and by giving the plaintiffs the costs of the suit as against the first defendant. The costs, if any, of ascertaining the amount of mesne profits should be in the discretion of the Court of the Subordinate Judge The first defendant must pay the costs of this appeal.

P. C.
Mohant Paramanandra Das Goswami v. Kripasindhu Roy.
Sir John Edge.

Solicitor for Appellants :—*E. Dalgado.*

Solicitors for Respondents :—*G.* and *W. Webb.*

A. P. P,

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SADASIVA AIYAR AND MR. JUSTICE NAPIER.

The Public Prosecutor ... *Appellant* in all.*

v.

Mahomed Sheriff Saheb and others ... *Accused in C. A. No. 93 of 1918.*

The Public Prosecutor v. Mahomed Sheriff Saheb.

Madras District Municipalities Act (IV of 1884), S. 188 cl. (1) (l)—Scope and applicability—Cl. (1) 'Livery stable'—Meaning.

Under clause (l) of S. 188 of the Madras District Municipalities Act of 1884 a license ought to be taken out for keeping such a place as that indicated in the clause in all cases in which the element of letting out on hire is involved in the use of the place.

A stable is a "livery-stable" within the meaning of sub-clause (l) of Clause 1 of S. 188 whether the number of horses kept in it for hire is one or more than one.

Appeals under S. 417 of the Code of Criminal Procedure 1898 against the orders of acquittal of the aforesaid accused passed by the first Class Bench Court at Madura in Summary cases Nos. 955, 956, 958, 959, 960, 962, 964, 965, 966 and 967 of 1917 respectively.

Public Prosecutor for the Crown.

The Court delivered the following

Judgment :—The Bench Magistrates are, no doubt, right in saying that according to *Queen Empress* v. *Ayyakannu Mudaliar* [1] the several words, used in clause (1) (l) of S. 188 of the District Municipalities Act "should be reasonably construed."

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* Cr. Appeals Nos. 93 to 104 of 1918 29th July, 1918.

1. (1898) I. L. R. 21 M. 293.

The Public Prosecutor v. Mahomed Sheriff Saheb.

But the reasonable construction indicated in the decision is that if the element of letting out on hire is involved in the use of the places indicated by the words, the legislature intended that such places should fall under the section and a license ought to be taken out for keeping such a place and the omission to take out a license should be punished.

The decision in *The Public Prosecutor* v. *Maduvaluth Gopal* Cr. Appeal No. 408 of 1902 reported in 1 Weir 737, is clearly applicable, the principle involved in that decision being, in our opinion the same as that on which *Queen Empress* v. *Ayyakannu Mudaliar* [1], was decided. Whether it is a single horse or more than one horse kept for hire in a stable, we think that the stable is a livery-stable.—(See also the definition of 'livery' "horse" in Murray's New English Dictionary).

We therefore set aside the acquittals in this case and in the connected cases, convict the accused under clause (1) of S. 188 of the District Municipalities Act and fine the accused each 8 annas.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR JOHN WALLIS, KT. CHIEF JUSTICE AND MR. JUSTICE NAPIER.

Mahbool Bi (died) and others ... *Appellants** (*Plaintiffs*).

v.

Sherifa Bi and others ... *Respondent* (*Defendants*).

Practice—High Court—Original side—Power of Judge to modify minutes before formal order is drawn up

A Judge sitting in the Original Side of the High Court has jurisdiction to modify the minutes of his order before the formal order is drawn up.

On appeal from the order of Mr. Justice Kumáraswami Sastri dated the 30th April 1917, made in the exercise of the Ordinary Original Civil Jurisdiction of this Court in C. S. No. 193 of 1915.

V. V. Srinivasa Iyengar, for Appellants.

K. C. Desikachariar, V. Ramaswami Aiyangar, A. Narasimhachariar, T. A. Vijayaraghavachariar and *T. Ananda Rao*, for Respondents.

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* O. S. A. No. 44 of 1917. 8th November, 1918.

1. (1898) I. L. R. 21 M. 293.

The Court delivered the following

Mahbool Bi v. Sherifa Bi.

Judgment :—At the time Mr. Justice Kumaraswami Sastri passed his present order, no formal order had been drawn up on the minutes of his previous order, and we think that, as a Judge sitting on the Original Side of the court, he had jurisdiction to modify the minutes before the formal order was drawn up. See *In re Suffield and Watts : Ex parte Brown* 1 and *Preston Banking Co*, v *William Allsup and Sons* 2.

The appeal is dismissed.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH.]

PRESENT :—SIR JOHN WALLIS, CHIEF JUSTICE, MR. JUSTICE AYLING, AND MR. JUSTICE SESHAGIRI AIYAR.

Batchu Ramajogayya ... *Petitioner* (Plaintiff).*

v.

Vajjula Jagannadham and another... *Respondents (Defendants).*

F. B

Batchu Ramajogayya v. Vajjula Jagannadham.

Minor—Contract by guardian on behalf of minor and for his benefit—Personal liability of minor.

Per Ayling and Seshagiri Aiyar, JJ.—No decree should be passed against a minor or his estate on a contract entered into on his behalf by a guardian, under which no charge is created on the estate, except in cases in which the minor's estate would have been liable for the obligation incurred by the guardian under the personal law to which the minor is subject.

Per Chief Justice.—A decree cannot be passed against a minor or his estate on a covenant entered into on his behalf by a guardian for his benefit.

Cases on the subject reviewed.

Petition under R. 8 of the Agency Rules for the Godavary District praying that in the circumstances stated therein the High Court will be pleased to issue an order directing the Agent to the Governor at Godavari to review his judgment, dated 4th July 1917, in Appeal Suit No. 3 of 1917 preferred against the decree of the Court of the Assistant Agent to the Governor at Badrachalam in Original Suit No. 12 of 1915.

The Court (Sadasiva Aiyar, and Napier, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

Napier, J.

Napier, J. :—The plaintiff in this suit sues for recovery of moneys due on a mortgage-deed executed in his favor by the mother of the 1st defendant as his guardian. The Lower

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* C. M. P. No. 2743 of 1917. 14th November, 1918.

1. (1888) 20 Q. B. D. 693.
2. (1895) 1 Ch. 141.

F. B.

Batchu Ramajogayya v. Vajjula Jagannadham.

Napier, J.

Appellate Court found that the greater part of the money was borrowed for the marriage of the 1st defendant's sister and that the amount was moderate and spent for legitimate purposes. Both Courts have held that the property could not be mortgaged without the sanction of Government. But the first Court held that the 1st defendant was bound to liquidate the debt by any property other than the mortgaged property, and decided that the plaintiff was entitled to a decree for Rs. 550 against the 1st defendant as head of the Vajjula family and manager of the family property. The decree followed the terms of the judgment.

The sole point taken before us is, that this is a personal decree against the minor on an obligation created by his guardian and that no such decree can be given. Reliance is placed on the decision of the Privy Council in *Waghela Rajsanji* v. *Shekh Masludin* [1]. The covenant in that case which was contained in a mortgage of a Talukdar's estate by his guardian, is found in the deed set out at pages 553 and 554. It is as follows :—" If Government should make a claim in any way * * * *and if you should have to pay * * * * all those moneys and the interest on those moneys we and our heirs are to pay to you. * * * * You are to recover your money from the said property, etc., and from our persons." The Bombay High Court gave judgment for a sum of Rs. 12,000 to be recovered from the defendant Rajsanji's property generally, as well as from him personally. So far as the personal liability is concerned, the view of Their Lordships is stated at page 561. "Now it was most candidly stated by Mr. Mayne, who argued the case on behalf of the respondent, that there is not in Indian Law any rule which gives a guardian and manager greater power to bind the infant ward by a personal covenant, than exists in English Law. In point of fact, the matter must be decided by equity and good conscience, generally interpreted to mean the rules of English Law if found applicable to Indian society and circumstances. Their Lordships are not aware of any law in which the guardian has such a power, nor do they see why it should be so in India. They conceive that it would be a very improper thing to allow the guardian to make

1. (1887) I. L. R. 11 Bom. 551.

F. B.

Batchu Ramajogayya v. Vajjula Jagannadham.

Napier, J.

covenants in the name of his ward, so as to impose a personal liability upon the ward, and they hold that in this case the guardian exceeded her powers so far as she purported to bind her ward, and that, so far as this suit is founded on the personal liability of the *Talukdar,* it must fail." This decision was considered by this Court in *Venkataswamy Naicker* v. *Muthuswamy Pillai* [1]. In that case, the guardian of a minor executed a bond in favour of a certain mortgagee to pay certain expenses which the lower Appellate Court found reasonable and with respect to which this Court was not prepared to differ from the lower Appellate Court. The High Court was of opinion that the decision in *Waghela Rajsanji* v. *Shekh Masludin* [2], went no further than this, that no decree should be made against the minor personally, but that a decree might be made against his property. It was admitted that if the property had been specifically charged, such a decree could be passed, but it was argued before the Court on the authority of *Indur Chander Singh* v. *Radha Kishore Ghose* [3] that in the absence of such a specific charge, no decree could be passed against the estate of the minor. The Court pointed out that in *Indur Chander Singh* v. *Radha Kishore Ghose* [3] the Judicial Committee were dealing with a document which did not purport to have been executed by a guardian on behalf of the minor, and referred to page 513 of the report where the Board pointed out that the plaintiff was asking the minor to fulfil obligations entered into by the lessees in their own name. The judgment also points out that in several cases since the decisions of the Privy Council, this Court has held that the minor's estate could be made liable, the decisions being *Subramania Ayyar* v. *Arumuga Chetti* [4], *Duraisami Reddi* v. *Muthial Reddi* [5], *Sanka Krishnamurthi* v. *The Bank of Burma* [6] and *Krishna Chettiar* v. *Natamani Ammal* [7]. In view of this *catena* of decisions in the Presidency, the Court saw no reason why they should refer the case to the Full Bench. It has now been pressed upon us that the decision in *Venkataswamy Naicker* v. *Muthuswamy Pillai* [1] does not give full effect

1. (1917) 34 M. L. J 177.
2. (1887) I. L. R. 11 Bom. 551.
3. (1892) I. L. R. 19 Cal. 507. (P. C)
4. (1902) I. L. R 26 Mad. 330
5. (1908) I. L. R. 31 M. 458.
6. (1911) I. L. R. 35 Mad. 692=21 M. L. J. 620.
7. (1915) I. L. R. 39 Mad. 915.

F. B.

Batchu Ramajogayya v. Vajjula Jagannadham.

Napier, J.

to the decision of the Privy Council in *Waghela Rajsanji* v. *Shekh Masludin* [1] in that that suit was dismissed by the Privy Council and no limited form of decree given. It is further contended that although in the case in *Indur Chander Singh* v. *Radha Kishore Ghose* [2], the mortgage did not purport to be executed *qua* guardian, there are *dicta* at page 511 which are inconsistent with the decision in *Venkataswamy Naicker* v. *Muthuswamy Pillai* [3]. The language is as follows :—"The contention that the mother and widow * * * had power to bind the minor by contract was abandoned in the Court below and their Lordships are of opinion that such a contention could not be sustained." I agree that this is definite language. But it is doubtful whether it carries the case any further than the decisions in *Waghela Rajsanji* v. *Shekh Masludin* [1]. Reliance is also placed on the decision of a Bench of this Court in *Swaminatha Aiyar* v. *Srinivasa Aiyar* [4]. But that was a case not of a guardian of a minor, but of a trustee with reference to temple property, and the question now before us only arose on the suggested analogy between such a trustee and the guardian of a minor. The last case prior to the decision in *Venkataswami Naicker* v. *Muthuswami Pillai* [3] is that in *Ammalu Ammal* v. *Namagiri Ammal* [5]. The question in that case was how far an estate can be made liable where the executors had borrowed money on a promissory note for the purpose of paying a legacy to the testator's daughter. The position then is this : that there are two cases in the Privy Council which go a long way to support appellant's contention ; and there are subsequent decisions of this Court, which, it is contended, are inconsistent with the *ratio decidendi* in the Privy Council cases.

I think it advisable, therefore, to refer to the Full Bench the question, whether any decree, and if so, what decree, can be passed against a minor or his estate on a covenant entered into on his behalf by a guardian for his benefit, under which covenant no charge is made on the estate.

Sadasiva Aiyar, J.

Sadasiva Aiyar, J.:—I agree.

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1. (1887) I. L. R. 11 Bom. 551.
2. (1892) I. L. R. 19 C. 507.
3. (1917) 34 M L. J. 177.
4. (1916) 32 M. L. J. 259.
5. (1916) 33 M. L. J. 631.

F. B.

Batchu Ramajogayya *v.* Vajjula Jagannadham.

M. Patanjali Sastri for *P. Narayanamurti* for petitioner. The guardian represents the minor's estate and as such representative he can bind it in a proper case, by contracts entered into by him on behalf of the minor. It is clear that a guardian can create a charge over the minor's property, *Hanuman Pershad's Case* [1]. He can acknowledge or renew debts on behalf of the minor, *Subramanya Iyer* v. *Arumuga Chetty* [2], *Annappagauda* v. *Sangadigyappa* [3], *Durasami* v. *Muthial* [4]. He can impose a liability on the estate for supply of necessaries to the minor, *Maharana Shri Ranmalsinghji* v. *Vadilal Vakhatchand* [5], *Juggeswar Sirkar* v. *Nilambar Biswas* [6]. There is no reason why, in a proper case, the guardian should not be able to make the estate of the minor liable on a simple contract. The true principle is stated by Mayne, Hindu Law, 8th Edn., pp. 288-289. The estate will be liable for debts contracted by the guardian in the course of business. *Muthaya Pillai* v. *Tinnevelly South India Bank* [7], *Malaiperumal Chettiar* v. *Arunachella* [8]. The Hindu and Mahomedan Laws recognise such liability, *Imambandi* v. *Mutasaddi* [9]. The manager of a joint Hindu family can make contracts binding on the minor. *Ganesh Row* v. *Tuljaram Row* [10], *Haricharan* v. *Kanla Rai* [11]. The decisions of this and other High Courts recognise the liability of the minor's estate in a case like the present. *Sundararaja Ayyangar* v. *Pattanathusami Tevar* [12], *Sinaya Pillai* v. *Munisami Ayyan* [13], *Srimath Daivasikamani Pandarasannadhi* v. *Noor Mahomed Routhan* [14], *Krishna Chettiar* v. *Nagamani Ammal* [15], *Venkitasamy Naiker* v. *Muthusami Pillai* [16]. The cases regulating liability of trustees under promissory notes executed by them are distinguishable. No question of the law merchant arises in this case. *Palaniappa Chettiar* v. *Shanmugam Chettiar* [17], *Swaminatha Aiyar* v. *Srinivasa Iyer* [18], *Ramaswami Mudaliar* v. *Muthuswami Ayyar* [19].

[*Chief Justice.*—There is no English case on the point.] No. The decided cases deal with the powers of executors and trustees. Though the creditor has no right of direct recourse against the estate he might claim to be subrogated to the rights of the trustee or executor. *Sankha Krishnamurti* v. *Bank of Burma* [20], *In re*

1. (1856) 6 M. I. A. 393.
2. (1902) I. L. R. 26 M. 330.
3. (1901) I. L. R. 26 B. 221, 232.
4. (1908) I. L. R. 31 M. 458.
5. (1894) I. L. R. 20 B. 61, 70.
6. (1865) 3 W. R. 217.
7. (1916) 5 L. W. 341.
8. (1917) 6. L. W. 417.
9. (1918) 35 M. L. J. 422 (P. C.)
10. (1913) I. L. R. 36 M. 295, 308.
11. (1917) 40 I. C. 142 (F. B.)
12. (1894) I. L. R. 17 M. 306.
13. (1899) I. L. R. 22 M. 289.
14. (1907) I. L. R. 31 M. 47, 49.
15. (1915) I. L. R. 39 M 915.
16. (1917) 34 M. L. J. 177.
17. (1918) 35 M. L J. 90.
18. (1916) 34 M. L. J. 259.
19. (1915) 30 I. C. 481.
20. (1911) I. L. R. 35 M. 692=21 M. L. J. 620.

F. B.

Batchu Ramajogayya v. Vajjula Jagannadham.

Johnson [1], *In re Evans* [2], *Dowse* v. *Gorton* [3], *Strickland* v. *Symons* [4], *Farhall* v. *Farhall* [5], *Ammalu Ammal* v. *Namagiri Ammal* [6]. The position of the guardian is analogous to that of an executor or trustee. Simpson on Infants, p. 289. The same principle will apply. The creditor should not be left without any remedy either by direct recourse or by subrogation in cases where the guardian contracts excluding his own liability.

The two cases relied on by the referring judges are not against me. The 'personal liability' referred to in *Waghela Rajsanji* v. *Shekh Masludin* [7] refers to the liability to arrest. This is clear from the terms of the covenant and from the fact that the properties of the minor were not liable to sale by reason of the Talukdari Act. This is how the case has been understood. *Mir Sarwarajan* v. *Fakharuddin Mahomed* [8] reversed on another point by the Privy Council *Mir Sarwarajan* v. *Fakharuddin* [9]. In *Indur Chunder Singh* v. *Radakishore Ghose* [10], the contract was not by the guardian on behalf of the minor at all but personal to the guardian. *Watson and Co.* v. *Sham Lal Mitter* [11] is more in point.

P. Somasundaram for Respondent :—A minor cannot contract and cannot enforce specific performance of a contract even though the contract is for his benefit. *Mohori Bibi* v. *Dhurmodas Ghose* [12], *Mir Sarwarajan* v. *Fakharuddin* [9]. How can he do this indirectly through a guardian ? The decision in *Waghela Rajsanji* v. *Shekh Masludin* [7] is exactly in point and the parties were Hindus. There is no principle of Hindu Law which makes the Privy Council decision inapplicable here. The cases relating to acknowledgment by a guardian are distinguishable. There is no imposition of a fresh liability in those cases. S. 68 of the Contract Act provides for the case of necessaries being supplied to a minor. The passage cited from Mayne, p. 288, merely lays down when the acts of a guardian will be binding on the minor. The cases cited by Mayne are mostly cases where a charge was created on the property. See *Manishankar* v. *Bai Muli* [13], *Rai Balakrishna* v. *Masuma Bibi* [14]. The case of a joint Hindu trading family is not analogous because the manager is not in the position of a guardian of a minor's property.

1. (1880) 15 Ch. D. 548.
2. (1887) 34 Ch. D. 597.
3. (1891) A C 190.
4. (1884) 26 Ch. D. 245.
5. (1871) 7 Ch. A. 123.
6. (1917) 33 M. L. J. 631.
7. 1887) I. L. R. 11 B. 551 (P. C.)
8. (1906) I. L. R. 34 C. 163.
9. (1911) I. L. R. 39 C. 232 (P. C.)
10. (1892) I. L. R. 19 C. 507 (P. C.)
11. (1887) I. L. R. 15 C. 8 (P. C.)
12. (1902) I. L. R. 30 C. 539 (P. C.)
13. (1888) I. L. R. 12 B. 686.
14. (1882) L. R. 9 I. A. 182.

F.B
Batchu Ramajogayya v. Vajjula Jagannadham.
Wallis, C. J.

The Court expressed the following

Opinion :—*Chief Justice* :—The decision of the Privy Council in *Waghela Rajsanji* v. *Shekh Masludin* [1], with reference to a personal covenant made on behalf of a Hindu minor by his guardian, that a guardian cannot be allowed to make covenants in the name of the ward so as to impose personal liability upon him, precludes us, in my opinion, from holding that a guardian has any such power in India. It was, however, pointed out in *Maharana Shri Ranmalsingji* v. *Vadilal Vakhatchand* [2], that this ruling does not affect the liability of the minor's estate under S. 68 of the Indian Contract Act to persons who have supplied him during minority with necessaries suited to his condition in life. What are necessaries must depend on the facts of each case, and in the case of a Hindu, money advanced for the expenses of a marriage which the minor has to perform or to pay off a debt binding upon him, may be recoverable under this head from his estate. It was held in this case that a guardian has no power to acknowledge debts on behalf of the minor, but this part of the decision was overruled by a Full Bench in *Annappagauda* v. *Sangadigyappa*, [3] where Sir Lawrence Jenkins, C. J., pointed out that the fact that a guardian cannot impose a personal liability on his ward by contract does not prevent him from binding the ward by acknowledgments under S. 19 of the Limitation Act: "for an acknowledgment under the Act is fundamentally different from a fresh contract, though it may in some respects have similar results." Further, where a guardian himself borrows money for the necessities of the minor in such circumstances as to give him a right to reimbursement from the minor's estate, his creditor may in a proper case be subrogated to his rights as held in *Sanka Krishnamurthi* v. *The Bank of Burma* [4]. In practically all the cases in this Court which are referred to in the order of reference or were cited before us, it will be found that the minor's estate could have been made liable under one of the first two heads independently of any contract by the guardian on his behalf. No practical inconvenience, therefore, would result from giving full effect to their Lordship's express decision, but, even if it were otherwise, we should be bound to follow it. That this

1. (1887) I. L. R. 11 Bom. 551.
2. (1894) I. L. R. 20 Bom. 61 at p. 70.
3. (1901) I. L. R. 26 Bom. 221 at p. 232.
4. (1911) I. L. R. 35 Mad. 692.

F. B.

Batchu Ramajogayya v. Vajjula Jagannadham.

Wallis, C. J.

rule is well settled appears to me to be assumed by the Privy Council in *Indur Chunder Singh* v. *Radha Kishore Ghose.* [1] I do not read the recent judgment in *Imambandi* v. *Mutsaddi* [2], as holding that a Mahomedan guardian can bind a minor's estate by contract except in the sense that the minor's estate will be liable for necessaries supplied by his agency, and that he can sell the minor's property in proper cases. The question under consideration in that case was the right of a *de facto* guardian to alienate the minor's property.

It was also argued that the decision in *Waghela Rajsanji* v. *Shekh Masludin* [3], only established the illegality of covenants imposing personal liability on the ward in the sense of making him liable to arrest after attaining majority in execution of a decree obtained against him on such covenants. This contention is clearly untenable.

The High Court had passed a decree against the appellant, who was sued after attaining majority on a covenant made during his minority by his guardian, for Rs. 12,000 with interest to be recovered from the defendant's property generally as well as from him personally. The contention raised on appeal was that the covenant was not binding on him at all, and their Lordships upheld this contention and dismissed the suit altogether. Further the 'term personally' liable is well understood in English Law, and has reference to the old classification of actions into personal, real and mixed. "Actions may be personal, as contradistinguished from real and mixed; the first being actions against the person only for damages, the second for recovery of real estate, the third for both." *A.-G.* v. *Lord Churchill* [4]. A man who was liable in the old personal actions of debt, covenant, trespass, etc., was said to be personally liable and is still so described after the abolition of these old forms of action and of the liability to arrest in execution. I think the answer should be that a decree cannot be passed against a minor or his estate on a covenant entered into on his behalf by a guardian for his benefit.

Ayling, J.

Ayling, J:—I would prefer to frame our answer as suggested by my learned brother Seshagiri Aiyar, J., in his judgment about to be delivered.

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1. (1892) I. L. R. 19 Cal. 507. 2. (1917) L. R. 45 I. A. 73=35 M.L.J. 422.
3. (1887) I. L. R. 11 B. 551. 4. (1841) 8 M. and W. 171, 192=151 E. R. 997.

F. B.
Batchu Ramajogayya v. Vajjula Jagannadham.
Seshagiri Aiyar, J.

Seshagiri Aiyar, J.:—It was tacitly agreed that the decision in *Indur Chunder Singh* v. *Radha Kishore Ghose* [1], to which reference is made in the order of the Division Bench has no bearing on the question we have to decide. That was a case of a personal and onerous executory contract by the widows in management which was held not to bind the minor heir. The question before us is what is the principle laid down in *Waghela Rajsanji* v. *Shekh Masludin* [2], and what are its limits. There are some accepted propositions : (*a*) A guardian can for a proper purpose, by apt words, create a charge over the property under his management so as to bind the minor. See *Dowse* v. *Gorton* [3] : (*b*) If the guardian acts for the minor and borrows and if the creditor obtains a decree for the loan against the guardian, the latter can sue the minor for reimbursement : This is based on the principle of subrogation and may shortly be styled the theory of indirect recourse. *Strickland* v. *Symons* [4], *In re Johnson*: *Shearman* v. *Robinson* [5], *Farhall* v. *Farhall* [6], and *Sanka Krishnamurthi* v. *The Bank of Burma* [7] : (*c*) For necessaries, the debts contracted by the minor himself or by his guardian would bind the estate : S. 68 of the Contract Act and *Maharana Shri Ranmalsingji* v. *Vadilal Vakhatchand* [8] : (*d*) If the guardian in management gives a bond in renewal of a debt binding on the minor, the estate could be proceeded against, as the act of the guardian may be regarded as keeping alive by acknowledgment a pre-existing liability : per Jenkins, C. J., in *Annappagauda* v. *Sangadigyapa* [9].

It is possible that the cases which are said in the Order of Reference to conflict with *Waghela Rajsanji* v. *Shekh Masludin* [2] may be brought under one or the other of the above categories. That is the view taken by my Lord and that is certainly one way of reconciling the Privy Council decision with the mass of cases which have been decided since that ruling.

However, I shall shortly point out that the decisions in Madras and in the other presidencies can be based on a broader ground. I do not wish to take a narrow view of

1. (1891) I. L. R. 19 Cal. 507.
2. (1887) I. L. R. 11 Bom. 551.
3. (1891) A. C. 190.
4. (1884) 26 Ch. D. 245.
5. (1880) 15 Ch. D. 548.
6. (1871) 7 Ch. 7 A. 123.
7. (1911) I. L. R. 35 Mad. 692.
8. (1894) I. L. R. 20 Bom. 61.
9. (1901) I. L. R. 26 Bom. 221 at p. 232.

F. B.
Batchu Ramajogayya v. Vajjula Jagannadham.
Seshagiri Aiyar, J.

Waghela Rajsanji v. *Shekh. Masludin* [1]. Mr. Justice Woodroffe in *Mir Sarwarajan* v. *Fakharuddin Mahomed Chowdhry* [2], states that what the Judicial Committee intended to lay down was that an onerous covenant cannot be imposed by the guardian upon the person or property of the minor. That is also my view. Although this decision was overruled by the Judicial Committee in *Mir Sarwarajan* v. *Fakharuddin Mahomed Chowdhry* [3] on another point, I do not think this view of the law was taken exception to in the argument before or in the judgment of the Privy Council. The various English decisions dealing with trustees and executors to which our attention was drawn in the course of the argument lay down that a trustee or executor has no power to bind the beneficiary by personal contracts —*In re Johnson: Shearman* v. *Robinson* [4] and *In re Evans : Evans* v. *Evans* [5]. I do not think the *bona fides* of the guardian is an element for consideration. But where an infant's estate would be liable but for the interposition of the guardian, I fail to see why the latter undertaking that liability should not bind the estate. After examining *Waghela Rajsanji* v. *Shekh Masludin* [1] once again, I do not think their Lordships intended to lay down that under no circumstances can a minor be held liable for the acts of his guardian. Almost all the High Courts have, since *Waghela Rajsanji* v. *Shekh Masludin* [1], held that the liability of the minor under the Hindu Law is not affected by the fact that the guardian has incurred that obligation. *Nathuram* v. *Shoma Chhagan* [6], *Maharana Shri Ranmalsinghji* v. *Vadilal Vakhatchand* [7], *Siva Narayan Ghosh* v. *Kamakhya Ghose* [8], *Sundararaja Ayyangar* v. *Pattanathuswami Tevar* [9], *Sinaya Pillai* v. *Munisami Ayyan* [10], *Subramania Aiyar* v. *Arumuga Chetti* [11], *Srimath Daivasikamani Pandarasannadhi* v. *Noor Mahomed Routhan* [12], *Duraisami Reddi* v. *Muthial Reddi* [13], *Krishna Chettiar* v. *Nagamani Ammal* [14] and *Venkitasamy Naicker* v. *Muthusamy Pillai* [15], have all taken this view. Sarjeant, C.J., Telang, J., Mookerjee, J. and Muthuswami Aiyar, J. are among the Judges who have enunciated this view.

1. (1887) I. L. R. 11 B. 551.
2. (1906) I. L. R. 34 C. 163.
3. (1911) I. L. R. 39 C. 232
4. (1880) 15 Ch. D. 548.
5. (1887) 34 Ch. D. 597.
6. (1890) I. L R. 14 B. 562.
7. (1894) I L. R. 20 B 61.
8. (1918) 28 Indian Cases 877 (Cal.)
9. (1894) I. L. R. 17 M. 306.
10 (1899) I. L. R. 22 M 289.
11. (1902) I. L. R. 26 M 380.
12 1907) I. L. R. 31 M. 47.
13. (1908) I. L R 31 M. 458.
14. (1915) I. L. R. 39 M. 915.
15. (1917) 34 M. L. J. 177.

F. B.
Batchu Ramajogayya v. Vajjula Jagannadham.
Seshagiri Aiyar, J.

If we examine some of the Privy Council decisions before, contemporaneous with, and after, *Waghela Rajsanji* v. *Shekh Masludin* 1, it will be seen that the Judicial Committee did not intend to lay down that under no circumstances can the guardian bind the estate of the ward, except it be by creating a charge. In 6 Moore's Indian Appeals 393, the well known case of Hanuman Prasad, their Lordships speak of a guardian borrowing on behalf of a minor and charging his estate in the same sentence. In *Watson and Company* v. *Sham Lal Mitter* 2 which is contemporaneous with *Waghela Rajsanji* v. *Shekh Masludin* 1 an agreement by a guardian to pay enchanced rent was held binding on the minor. In *Imambandi* v. *Mutsaddi* 3, the Right Honourable Mr. Ameer Ali lays down that a Mahomedan guardian can bind a minor's estate by contracts entered into for the latter's benefit. So the rule of law in *Waghela Rajsanji* v. *Shekh Masludin* 1 is subject to exceptions. Strong reliance was placed on the observation of Lord Hobhouse at page 561: "Now it was most candidly stated by Mr. Mayne, who argued the case on behalf of the respondent, that there is not in Indian Law any rule which gives a guardian and manager greater power to bind the infant ward by a personal covenant than exists in English Law". I do not think that it was intended to lay down by this statement that no rule to the contrary under the Hindu Law would be countenanced. The term *Indian Law* was meant to apply to the statute law of the land and not to Hindu or Mahomedan Law. I am therefore of opinion that the rule laid down in *Waghela Rajsanji* v. *Shekh Masludin* 1 was not intended to affect the Hindu Law liability of the minor. In this view, the decisions which are mentioned in the order of reference are not inconsistent with *Waghela Rajsanji* v. *Shekh Masludin* 1.

I would therefore answer the question under reference by saying that no decree should be passed against a minor or his estate on a contract entered into on his behalf by a guardian, under which covenant no charge is created on the estate except in cases in which the minor's estate would have been liable for the obligation incurred by the guardian under the personal law to which he is subject. Although the answer given by the learned Chief Justice read with his opinion would cover my opinion also, I respectfully think that in order that doubts may

1. (1887) I. L. R. 11 Bom. 551. 2. (1880) I. L. R. 5 Cal. 381.
3. (1918) 45 I. A. 73.

F. B.

Batchu Ramajogayya v. Vajjula Jagannadham.

not be entertained as to our meaning, the answer should be in the form I have suggested.

A. V. V.

PRIVY COUNCIL.

PRESENT :—LORD SUMNER, LORD PHILLIMORE, SIR JOHN EDGE, AND MR. AMEER ALI.

[On appeal from the High Court of Judicature at Madras.]

Kandukuri Veera Basavaraju Pantulu and others. *Appellants.**

v.

Kandukuri Balasurya Prasada Rao Pantulu and others. *Respondents.*

P. C.

Kandukuri Veera Basavaraju Pantulu v. Kandukuri Balasurya Prasada Rao Pantulu.

Hindu Law—Mitakshara—Adoption by widow in the Dravida country with assent of Sapindas—Whose assent is necessary—Position of a widow in an undivided family—Case of a divided family—Assent of nearest kinsmen equally necessary—Rights to property not to be disregarded.

Under the Dravidian branch of the Mitakshara Law, in the absence of authority from her deceased husband, a widow may adopt a son with the assent of his male agnates. This was established in the Ramnad case (*Collector of Madura* v. *Mutu Ramalinga Setupathy* [1].

In the case of an undivided family, the consent must be obtained by the widow within that family: if the father-in-law is alive from him: if not, from the deceased husband's brothers. The assent of separate and remote kinsmen is insufficient.

The principle is the same if the husband dies separate from his kindred. The widow must still obtain the assent of her father-in-law, if he be dead, of the divided brothers or the other nearest Sapindas. In considering what assent is sufficient, rights of property cannot be disregarded: and the widow cannot be allowed to adopt on the assent of remoter relations when there are nearer ones in existence.

Appeal from a decree of the Madras High Court, dated April 17, 1914, affirming a decree of the District Judge of Ganjam.

The facts of the case are sufficiently stated in their Lordships' judgment. The only question for determination in the appeal was as to the validity of the adoption of the plaintiff-appellant No. 1. The trial Judge found that the consent of the Sapindas, on which such adoption was based, was insufficient: also, that the widow who adopted the plaintiff had no power surviving in her to make such adoption whatever assent she received. The High Court (Sir C. Arnold White, C. J. and Oldfield, J.) affirmed the dismissal of the suit on the first ground only.

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1. (1868) 12 M. I. A. 397.

P. C.

Kandukuri Veera Basavaraju Pantulu v. Kandukuri Balasurya Prasada Rao Pantulu.

Hence this appeal.

De Gruyther, K. C. and *Parikh* for appellants: The necessary consent of Sapindas was in fact given. Both Courts are against us on this point, but their findings are not conclusive, as the question is really one of law. The authorities show that the widow's motives in making an adoption are immaterial, but that the corrupt giving of assent is bad. All that has to be shown is that the Sapindas exercised their discretion *bona fide* : that they consented upon what they believe to be the wish of the deceased that an adoption should take place.

(*Dunne K. C.* for respondents. The case is covered by *Madana Mohana Deo* v. *Purushothama Deo* [1].

That is quite different from the present case.

[*Lord Sumner* :—If it be clear that the widow never thought of any spiritual benefit to her husband, but merely wanted to spite some one, cannot the adoption be invalidated ?]

That is no worse than her failing to adopt from private motives although authorised. Her motives are immaterial. It is true that the nearest Sapindas here have not given their consent, but we have the consent of others, and it is not necessary that all should assent: you only need sufficient assent to show that the adoption was in the interest of the deceased, or should be presumed to be in his interest" : *Collector of Madura* v. *Mutu Ramalinga Setupathy (the Ramnad case)* [2], *Rajah Vellanki Venkata Krishna Row* v. *Venkata Rama Lakshuri Narayya* [3], *Venkata Krishnamma* v. *Anna Purnamma* [4], *Parasara Bhattar* v. *Ranga Raja Bhattar* [5].

Dunne, K. C. and *Dube* for respondents were not called on.

Their Lordships' judgment was delivered (July 11, 1918) by

Mr. Ameer Ali.

Mr. Ameer Ali :—This appeal arises out of a suit brought by the plaintiff, Basavaraju, on the 22nd December, 1909 in the Court of the District Judge of Ganjam, in the Madras Presidency, for possession of considerable landed property by virtue of his right as the nearest reversioner by adoption to one Vishwanadha Row, the last male owner. And the question for determination by this Board is whether the adoption under which he claims title is valid under the Hindu law. Vishwanadha died in 1880, and since his death the properties were held by his widow, Mahalakshmamma, for a Hindu widow's estate until her decease in 1908, when the defendants, who are admittedly the grandsons of Vishwanadha's paternal grand-uncle

1. (1918, L. R. 45 I. A. 156=35 M. L. J. 138=41 M. 855.
2. (1868) 12 M. I. A. 397, 440, 441.
3. (1876) L. R. 4 I A 13=I L. R. 1 M. 174 (P. C.)
4. (1899) I. L. R. 23 M. 486=10 M. L. J. 73.
5. (1880) I. L. R. 2 M. 202.

P. C.

Kandukuri Veera Basavaraju Pantulu v. Kandukuri Balasurya Prasada Rao Pantulu

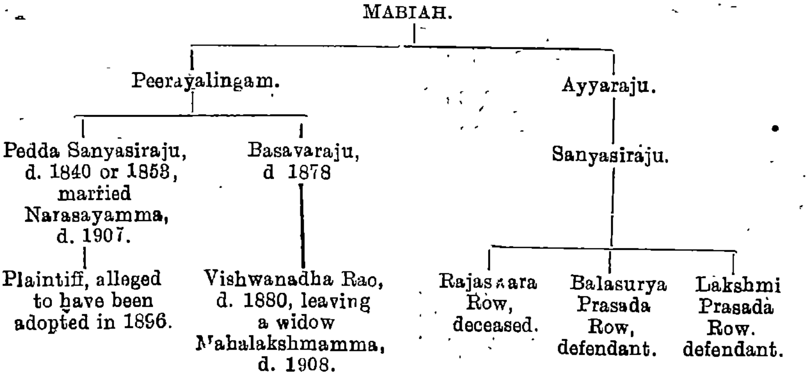
Mr. Ameer Ali.

and who, on failure of the adoption alleged by the plaintiff, would be entitled as the nearest reversioners, took possession of the same, and their possession was confirmed by the revenue authorities, before whom the question now in dispute was first litigated.

The plaintiffs' claim is based on the allegation that Basavaraju, the father of Vishwanadha, and one Pedda Sanyasiraju were two brothers, and that Pedda predeceased Basavaraju, leaving a widow named Narasayamma, who in 1896 adopted him as a son to her husband. He is, thus, he asserts, nearer in degree as the paternal uncle's son to Vishwanadha and has, therefore, a title superior to that of the defendants to the succession to his estate.

The *Ramnad Case* [1] established the proposition that, under the Dravidian branch of the Mitakshara law, in the absence of authority from her deceased husband a widow may adopt a son with the assent of his male agnates in the Dravida country, where such law is in force. The plaintiff, accordingly, placed his adoption on two grounds—first that Narasayamma had direct authority from her husband to adopt a son to him ; and secondly that his own adoption was made with the authority of the husband's kindred.

After the institution of the suit other parties, who had acquired interest in the properties in dispute from the plaintiff or from his guardian, were joined as co-plaintiffs ; it is, however, unnecessary to refer to them in this judgment. The following pedigree will explain the exact relationship of the contesting parties :—



(1). (1868) 12 M. I. A., p. 397.

P. C.

Kandukuri Veera Basavaraju Pantulu v. Kandukuri Balasurya Prasada Rao Pantulu.

Mr. Ameer Ali.

The defendants challenged both the power of the widow to make any adoption and the validity of the assent or authority with which it was alleged to have been made. They contended that under the circumstances, which will be detailed later, Narasayamma had no power to make an adoption to her deceased husband, and that in any event the assent of the Sapindas, on which its validity was conditioned, was not legally sufficient. The District Judge before whom the case came for trial in the first instance, in an able judgment in which he examined the facts as well as the law applicable to those facts with considerable care, came to a conclusion wholly adverse to the plaintiff. He held in substance that the plaintiff had failed to establish the alleged authority from the husband to the adopting widow, and that the consent of the Sapindas on which the claim was rested was not sufficient. The learned Judge further held that Peerayalingam and his two sons Pedda and Basavaraju formed a joint undivided Hindu family ; that Pedda died in the life-time of his father somewhere before 1842 ; that on his death his interest in the joint family property vested by right of survivorship in Peeraya and Basavaraju ; and that he left no separate property to which his widow could succeed and hold separately. He held that in this condition of the joint family the power and capacity of his widow to make any adoption to him came to an end when the joint family property vested in Vishwanadha's widow. He accordingly dismissed the plaintiffs' suit. The High Court of Madras on the plaintiffs' appeal did not consider it necessary to enter upon a consideration of this latter branch of the learned Judge's decision relating to Narasayamma's power to make the adoption. They, however, concurred with the First Court in its other findings, and in agreement with the Trial Judge held that the Sapindas' assent was not sufficient in law to validate the adoption in question, and dismissed the appeal.

The plaintiffs have now appealed to His Majesty in Council, and it has been strenuously urged on his behalf that the Lower Courts have wrongly applied the law to the present case. As the Trial Judge has in his judgment fully set out the facts, their Lordships are relieved of the necessity of stating them in any detail. They propose, therefore, to refer only to some salient points in the history of this family. It appears that Peerayalingam, the grandfather of Vishwanadha, died in

P. C.

Kandukuri Veera Basavaraju Pantulu v. Kandukuri Balasurya Prasada Rao Pantulu

Mr. Ameer Ali.

1846, leaving him surviving his widow Veyamma, who was the owner in her own right of the greater part of the property which forms the subject-matter of this litigation. The plaintiffs allege that Pedda died in 1853, whilst the defendants place his death so far back as 1840. As already stated, the Trial Judge has found on the evidence that the latter date represents approximately the real date of his death. The finding is that he died some years before his father's death in 1846. Veyamma died in 1855, when the entire family estate vested in Basavaraju, the surviving son of Peeraya. He died in 1878, leaving a son Vishwanadha, who survived him only two years. On his death his widow succeeded to the estate, and held it as a Hindu widow until 1908. Narasayamma, the widow of the pre-deceased co-parcener, had become, on the death of her husband, entitled to maintenance, which she received from the estate until her death in 1907. Peerayalingam, the grandfather of Vishwanadha, had a brother named Ayyaraju; his son was also called Sanyasiraju and the present defendants are the sons of Sanyasi. At the time of the alleged adoption this Sanyasi, who might be conveniently called Sanyasi II, was alive. Upon this state of facts the two questions of law which the High Court had to determine were exactly the two which the District Judge has discussed and decided. First (and this went to the very root of the plaintiffs' title), whether Narasayamma had, under the circumstances of Peerayalingam's family, any power in 1896 surviving in her to make the adoption; secondly, if she had, whether the assent that is put forward is sufficient. As already observed, the High Court have abstained from expressing an opinion on the first point.

Assuming that Narasayamma had, when she purported to adopt the plaintiff Basavaraju, the power to make the adoption, the question arises whether that power was validly exercised. In the absence of authority from the husband, the valid exercise of the power by a Hindu widow in the Dravida country is conditioned on the assent of her husband's Sapindas. In the present case the claim is rested on the assent of seven kinsmen. The District Judge has, for convenience of reference and examination, divided the agnatic relations of Vishwanadha living at the time of the alleged adoption into five groups in the order of propinquity. In the first group are included Sanyasiraju

P C.

Kandukuri Veera Basavaraju Pantulu v. Kandukuri Balasurya Prasada Rao Pantulu.

Mr. Ameer Ali.

(the defendants' father) and the defendants. Sanyasaraju died in 1899 ; it has been found that his assent was not asked for nor given. In the second group are included three persons whose consent is said to be contained in a paper Exhibit B. Both Courts have held their signatures to be forgeries. To group 3 belong plaintiff Basavaraju's father, his paternal uncle, and a witness of the name of Ayyapa Raju. These three have certainly given their assent to the adoption.

To group 4 belonged a man named Borayya Bhusana, since deceased, who is alleged to have conveyed his assent in a letter addressed to the widow. This letter contains a general approval of her intention to make an adoption, but does not evince a consent to any specific adoption. There are several men in the remotest group who do not seem to have been approached and do not enter into the consideration of the case. The question then is whether, in the absence of authority from the husband and of the consent of the nearest sapinda, the assent of remote sapindas is sufficient to validate the exercise of the widow's power? None of the decided cases deal with the concrete question under consideration. The decision in the *Ramnad Case*, which forms the principal authority on the validity of an adoption with the consent or authority of the husband's sapindas, declares in general terms the class of kinsmen among whom the consent should be sought ; and the generality of the expressions has in some instances given rise to doubts. But a close examination of the judgment shows clearly to their Lordships'mind what the Board intended to indicate. Dealing first with the case of a joint and undivided family, joint in food, worship, and estate, the Board observed as follows :—

"The question who are the kinsmen whose assent will supply the want of positive authority from the deceased husband is the first to suggest itself. Where the husband's family is in the normal condition of a Hindu family—*i.e.*, undivided—that question is of comparatively easy solution. In such a case the widow under the law of all the schools which admit this disputed power of adoption, takes no interest in her husband's share of the joint estate, except a right to maintenance. And though the father of the husband, if alive, might, as the head of the family and the natural guardian of the widow, be competent by his sole assent to authorise an adoption by her, yet, if there be no father, the consent of all the brothers who, in default of adoption, would take the husband's share would probably be required, since it would be unjust to allow the widow to defeat their interest by introducing a new co-parcener against their will."

There the widow had acquired some property which was held by her husband separately from the other members of the

P. C.

Kandukuri Veera Basavaraju Pantulu v. Kandukuri Balasurya Prasada Rao Pantulu.

Mr. Ameer Ali.

family, which is not the case in the present instance, as Pedda left no separate property. Dealing with the case of a widow so situated, Sir James Colvile went on to say :—

"Where, however, as in the present case, the widow has taken by inheritance the separate estate of her husband, there is greater difficulty in laying down a rule. The power to adopt when not actually given by the husband can only be exercised when a foundation for it is laid in the otherwise neglected observance of religious duty, as understood by Hindus. Their Lordships do not think there is any ground for saying that the consent of every kinsman, however remote, is essential. The assent of kinsmen seems to be required by reason of the presumed incapacity of women for independence rather than the necessity of procuring the consent of all those whose possible and reversionary interest in the estate would be defeated by the adoption. In such a case, therefore, their Lordships think that the consent of the father-in-law, to whom the law points as the natural guardian and 'venerable protector' of the widow, would be sufficient. It is not easy to lay down an inflexible rule for the case in which no father-in-law is in existence. Every such case must depend upon the circumstances of the family. All that can be said is that there should be such evidence of the assent of kinsmen as suffices to show that the act is done by the widow in the proper and *bona fide* performance of a religious duty, and neither capriciously nor from a corrupt motive."

The decision in the *Ramnad Case* was followed and explained in *Raja Vallanki* v. *Venkata Rama* [1], which established the following propositions : That the requisite authority in the case of an undivided family is to be sought by the widow within that family ; that it is in the members of that family that she must presumably find such counsellors and protectors as the law makes requisite for her ; and that she cannot at her will travel out of that undivided family and obtain the authorisation required from separated and remote kinsmen of her husband. This being the position of a widow in an undivided family, what are the conditions imposed on her if her husband happens to die in a state of separation from his kindred ? Division does not affect her personal dependence or give her an independent status to alter by her own authority the succession to the estate which she takes as the widow of her husband. She is still dependent for counsel and protection upon the nearest sapindas of her husband, who are the most closely united to him by ties of blood, or, to use the language of Hindu lawyers, by "community of corporal particles." The father of the deceased, if still alive, continues to be her "natural guardian and venerable protector." He has further more a direct interest in the protection of the estate, for in case of her death without leaving her

1. (1876) L. R. 4 I. A. 1 ; I. L. R. 1 M. 174.

P. C.

Kandukuri Veera Basavaraju Pantulu *v.* Kandukuri Balasurya Prasada Rao Pantulu.

Mr. Ameer Ali.

surviving a daughter or the mother of her deceased husband he has a right to the reversion. His authorisation is therefore essentially requisite to the validity of an adoption by her to her husband. If there is no father the divided brothers take his place by virtue of the tie of blood as her husband's nearest Sapindas ; they become her natural guardians and the protectors of her interests. They also have an interest in the protection of the inheritance. In the absence, then, of the father the assent of the divided brothers is equally requisite for the validity of the widow's adoption. If a majority assent and one refuses, his objection may be discounted. But the absence of their consent or in case there is only one, of his consent, cannot be made good by the authorisation of distant relatives remotely connected whose interest in the well-being of the widow or the spiritual welfare of the deceased, or in the protection of the estate, is of minute character, and whose assent is more likely to be influenced by improper motives. In this connection it seems desirable to bear in mind the following observations of the Board in *Raghunada Deo* v. *Brojo Kishoro Deo* [1] :—

"But it is impossible not to see that there are grave social objections to making the succession of property—and it may be in the case of collateral succession, as in the present instance, the rights of parties in actual possession—dependent on the caprice of a woman, subject to all the pernicious influences which interested advisers are too apt in India to exert over women possessed of, or capable of exercising dominion over, property. It seems, therefore, to be the duty of the Courts to keep the power strictly within the limits which the law has assigned to it."

It is true that in the judgment of this Board in the *Ramnad Case* some expressions are used which might imply that the question of reversionary interest forms only a secondary consideration in determining what sapindas' assent is primarily requisite, but the remarks that follow as to the right of co-parceners in an undivided family to consider the expediency of introducing a new co-parcener, coupled with the observations of the Board in the subsequent case *Vallanki* v. *Venkatarama* [1] show clearly that rights to property cannot be left out of consideration in the determination of the question.

In the latter case the Board observe as follows :—

"There should be such proof of assent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the widow

1. (1876) L. R. 3 I. A. 154.
2. (1876) L. R. 4 I. A. pp., 1,14 : I. L. R. 1 M. 174.

P. C.

Kandukuri Veera Basavaraju Pantulu v. Kandukuri Balasurya Prasada Rao Pantulu.

Mr. Ameer Ali.

not from capricious or corrupt motives, in order to defeat the interest of this or that sapinda, but upon a fair consideration of what may be called a family council of the expediency of substituting an heir by adoption to the deceased husband."

And an eminent Hindu lawyer, dealing with the question whose consent is requisite to the validation of an adoption when the husband is separate, remarks that an adoption is more a temporal than a spiritual institution, there being no spiritual reason for adoption if the deceased left a fraternal nephew; and that the requisites of a valid adoption are all temporal; therefore, the spiritual consideration should not be allowed to influence the judgment regarding the secular essential. And he then goes on to add—

"Some light is thrown on the point by the decisions relating to alienations by widows with the assent of the next heir." (1)

The reasons which make the assent of divided brothers a requisite condition apply *mutatis mutandis* to the case of the nearest sapindas other than brothers. In the present case Sanyasaraju II was unquestionably the nearest sapinda to Pedda at the time of Narasayamma's adoption. He was also unquestionably nearest to Vishwanadha. The case for the plaintiff is that in 1882 he had given his consent to Narasayamma making an adoption, which was repeated in 1894. The Trial Judge who heard the evidence found as a fact that both allegations were false; and the High Court agree in that view. The concurrent finding of the two Courts on this point is not open to question on this appeal. Their Lordships consider, even if it were open to discussion, the reasons given by the District Judge for disbelieving the story to be conclusive.

It was argued at the bar that no application was made for the assent of Sanyasaraju II because it was known that he would refuse. This, in their Lordships' opinion, is a futile reason for not applying for his assent.

In their Lordships' opinion this suit must fail on the second ground on which the Trial Judge decided the case, *viz.*, that Narasayamma did not obtain the requisite assent necessary for the valid exercise of that power. Their Lordships express no disapproval of the decision of the District Judge on the first point, but, like the High Court, do not find it necessary to decide it.

1. Golap Chandra Shastri on the Hindu Law of Adoption.

P. C.
Kandukuri Veera Basavaraju Pantulu
v.
Kandukuri Balasurya Prasada Rao Pantulu.

Mr. Ameer Ali

Their Lordships will accordingly humbly advise His Majesty that the decree of the High Court dismissing the suit should be affirmed and the appeal should be dismissed with costs.

Solicitor for Appellants :—*E. Dalgado.*

Solicitor for Respondents :—*Douglas Grant.*

A. P. P.

PRIVY COUNCIL.

PRESENT :—LORD SUMNER, SIR JOHN EDGE, MR. AMEER ALI AND SIR W. PHILLIMORE, BART.

[On Appeal from the High Court of Judicature at Madras.]

Raja Jagaveera Rama Venkateswara ... *Appellant.**

v.

Alawarasa Asari and Others ... *Respondents.*

P. C.

Raja Jagaveera Rama Venkateswara
v.
Alawarasa Asari.

Madras Rent Recovery Act (Madras Act 8 of 1865), S. 11.—Land-law of Madras—Rates of rent—Contracts paramount to status and usage—Contracts implied from bare payment and acceptance of rent—Consideration for promise to pay necessary.

Under S. 11 of the Madras Rent Recovery Act (Madras Act 8 of 1865) the rent payable by a tenant to his landlord is determined primarily by contract, which may be either express or implied. Failing such contract, resort is had, when no settlement has taken place, to local usage; but if such usage establishes a proper rent, either party may require resort to the warum customary in the village for division of the crop. Failing proof of such customary warum, it is the Collector's duty to fix the rent. All these latter methods however are only applicable in cases where no contract is proved.

The expression "implied contract" in the section is an English term of art, and must be so construed : it involves the legal incident of some consideration moving from the landlord, as that incident is understood in English Law.

A number of ryots had for years paid rent at the rate of 4 fanams, which was the prevalent rate for dry lands At various dates, having dug wells at their own expense, they took up garden cultivation, and were thereafter charged, and for years paid rent at the rate of 8 fanams prevailing for wet lands. For Fasli 1912 however they refused to accept pottahs at that rate. It was found, in view of the long continuance of payments at the 8 fanams rate, that there was an implied contract to go on paying that rate, but that there was no consideration for the new promise, the land being already held on a contract to pay 4 fanams.

Held, that the implied contract was not legally enforceable, and that the ryots were entitled to pottahs at the old (4 fanam rate).

Consolidated appeals from several decrees of the Madras High Court, dated September 21, 1910, reversing decrees of the District Judge of Madura and restoring those of the Sub-Collector of Dindigul.

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* 10th 13th and 14th May 1913.

P. C.

Raja Jagaveera Rama Venkateswara v. Alawarasa Asari.

The facts of the case will appear from their Lordships' judgment and from the report of the earlier proceedings in 35 Mad. 134 : On this appeal.

De Gruyther, K. C.—(*Dube* with him) for appellant submitted that the rents were fixed on the kind of crop raised: 8 fanams was the landlords' share of the crop raised. The practice, before cash rents were fixed, was for the zemindar to take a share of the produce. According to the local usage rent is payable not according to whether the land is punja (dry) or nanja (wet) but according to the crop raised. If there is no contract, the Court will under S. 11 of Madras Act 8 of 1865 fix the rent according to the local usage, but if not satisfied with that we can resort to the warum or division in kind.

The invariable practice in India from time immemorial was for the zemindar to have a share of the produce—Fifth Report of 1912, Madras part, p. 8. When a money rent was fixed, it was fixed with reference to the crop produced. It does not matter to us when the wells were dug, and the nature of the crop changed: we are not enhancing the rent: we have all along been entitled to that rent on that crop. It has never been found that there was any contract that the ryots should pay 4 fanams for garden lands. They have raised a more valuable crop; and so we get a higher rent.

The answer to the argument as to want of consideration is that there never was a contract to pay 4 fanams irrespective of the crop, the rate was not permanently fixed at 4 fanams: when the garden crop was raised the zemindar asked the tenant to pay 8, and the tenant agreed.

The contract to pay that 8 fanams was at first express and is now implied: it is implied from the fact that for years the ryots have in fact paid 8 fanams.

The Madras Rent Recovery Act does not prohibit contracts which give the landlord a share in the benefit of the tenants' improvements—*Natesa Gramani* v. *Venkatarama Reddi* [1] where at p. 516 this very case is referred to.

When the warum is commuted into a money rent, an agreement to pay an increased rent for a particular cultivation is not illegal, nor is a custom to pay such an increased rent: *Suppa Pillai* v. *Nagayasami Thumbichi Naicker* [2].

In the absence of contract the rent is settled every year for that year only: from the fact that the tenants for many years paid 4 fanams there is not to be implied a contract that they were to go on paying only 4 fanams: *Sri Raja Parthasaradhai Appa Rou v. Chevendra Venkata Narasayya* [3].

1. (1907) I. L. R. 30 Mad. 510 ; 17 M. L. J. 518.
2. (1907) I. L. R. 31 Mad. 19 ; 17 M. L. J. 511.
3. (1910) L. R. 37 I. A. 110 ; 33 M 177 : 20 M. L. J. 596.

P. C

Raja Jagaveera Rama Venkateswara v. Alawarasa Asari.

Dube followed.—The custom to pay a minimum of 8 fanams for garden cultivation has been abundantly proved. Some of these tenants have been paying that rate for 40 years.

J. M. Parikh, for respondents; referred to Wilson's Glossary, p. 154. "Faisal tirwai" is there explained as "the rates settled on each field at the time of the original survey assessment (Madras)". As defendant-appellant's written statement admits, the faisal rates were fixed in Fasli 1210=1803, when the original survey and assessment were made—(vide also the Fifth Report and *Venkatagopal* v. *Rangappa* [1]). The point is that the assessment was according to the land, not according to the crop grown.

The policy of Government, as set out in Regulation XXX of 1802 (repealed by Madras Act 8 of 1865) was to give the tenants fixity of tenure at a permanent rate of rent.

[*Sir W. Phillimore*: I don't understand that what was dry land then was always to be assessed as dry land.]

The assessment was on particular pieces of land—it was made with the tenants on the same lines as the permanent settlement with the zemindars.

The documents—pottahs and muchalkas—filed in the case lend no support to the appellant's argument—they show that the same crop might be grown on punja (dry) land and on garden land.

The appellant now relies upon a custom of enhancement and alternatively, upon an implied agreement to pay an enhanced rate. This was not his case in the lower Courts. Those Courts have assumed that the 4 fanams rate is the permanent rate, and that the burden of proving variation is on the zemindar. The only evidence of such variation is that the tenants have in fact paid the enhanced rate without protest for periods varying from 2 to 40 years. To have a contract there must be mutual consent; and the tenants must know their rights. The so-called implied contract is a mere inference of law from certain facts found.

[*Sir John Edge*: Surely it is an inference of fact?]

It may be presumptive evidence, but it is rebuttable—it could be rebutted for instance by proving mistake on the part of the tenant. The High Court say there is very meagre evidence to support the District Judge's finding of an implied contract: I say there is none. Secondly, I say that even if there *is* such a contract it is not enforceable for want of consideration.

The three cases cited against us are all distinguishable. In *Sri Raja Parthasaradhi Appa Rou* v. *Chevendra Venkata Narasayya* [2]

1. (1883) I. L. R. 7 Mad. 365, 369. 2. (1910) L. R. 37 I. A. 110 : 20 M. L. J. 596.

P. C.

Raja Jagaveera Rama Venkateswara v. Alawarasa Asari.

the rent was not fixed permanently. In *Natesa Gramani* v. *Venkatarama Reddi* [1] the land was unassessed land and no question of consideration was raised, nor was there any question of cancelling the contract on the ground of mistake—there was no mistake. In *Suppa Pillai* v. *Nagayasama Thumbichi Naicker* [2] there is a special finding of fact that there was an express contract, when the warum was commuted, to pay a special rate for betel cultivation.

There is no such thing in Madras as tenancy from year to year: the ryots are permanent, irrespective of the pottahs they may give from time to time.

To sum up, the land here is permanently assessed land: the burden of proving a variation is on the zemindar: and there is no proof of such consent as an implied contract requires.

De Gruyther, K. C., in reply: As to mistake S. 21 of the Indian Contract Act provides that a contract is not voidable for a mistake of law.

The District Judge was justified in finding that there was an implied contract to pay the higher rate in future years: and if that finding is one of fact, it is binding.

Their Lordship's judgment was delivered (July 2,1918) by.

Lord Sumner.

Lord Sumner.—This was a consolidated appeal in suits brought by a number of ryots in the zemin of Gandamanaickanoor against their landlord, the zemindar of Ettiyapuram, in the district of Tinnevelly. He had tendered pottahs for Fasli 1312, at 8 fanams per guli, at which rate they had paid rent for several years. These the ryots rejected, claiming that the proper rate was 4 fanams only, and brought these suits under S. 8 of the Madras Rent Recovery Act (No. VIII of 1865) to obtain such pottahs as they said they were entitled to receive.

The Act of 1865, though since repealed by the Madras Estates Land Act (No. I of 1908) was the Act then in force, and in suits "involving disputes regarding rates of rent," S. 11 provides that "all contracts for rent, express or implied shall be enforced." Though this statute does not define "rent," S. 3, which makes the delivery of pottahs and muchalkas mutually obligatory, requires that they shall state "the amount and nature of the rent," according as "it is payable in money or in kind or by a share in the produce." Regulation 30 of 1802, which had provided for such written records, and for fixing

1. (1907) I. L. R. 30 M. 510 : 17 M. L. 518.
2 (1907) I. L. R. 31 M. 19 : 17 M. L. J. 511.

rents by the rates in the Government assessment, was generally silent as to rents fixed by contract between the parties. *Venkatagopal's Case* [1] explains the circumstances under which between 1802 and 1865, it had become necessary to give effect to contracts and not merely to status and usage, and more particularly to such contracts as are implied from bare payment and acceptance of rent at a particular rate or measured in a particular way. Whether the framers of the Act fully appreciated its effect or not, the expression "implied contract" is an English term of art, and must be so construed. It involves the legal incident of some consideration moving from the landlord, as that incident is understood in English Law. Accordingly the scheme of the section was as follows: If a contract, express or implied, and legally enforceable, was once established, the issue was determined, and the proper pottah was one giving effect to that contract. If, on the other hand, no such contract could be established, then, since in the words of the District Judge on the second hearing in his Court, "it is not pretended that this zemindari was surveyed by Government before the 1st January, 1859," local usage could be proved. If such usage established a proper rent, then either party, if dissatisfied with it, could require resort to the warum customary in the village for the division of the crop between landlord and tenant (of which no evidence was given or could have been given in these suits, as events happened), and, failing proof of such a customary warum, it would have been the collector's duty to fix such rate as he thought just, "after ascertaining if any increase in the value of the produce or in the productive power of the land has taken place, otherwise than by the agency or at the expense of the ryot." It followed, under this scheme, that if these ryots failed to prove an implied contract at 4 fanams enforceable between the parties, and, if the landlord succeeded in proving such a contract at 8 fanams, no further issue arose for decision.

The course which the litigation took was this: Thirty-eight suits were begun in 1903 and, although the ryots came from different villages in the zemindari, and had paid the garden rate for very varying terms, one alone, taken as typical of the rest at any rate so far as concerns the present appeal, was

1. (1883) I. L. R. 7 Mad. 365.

P. C.

Raja Jagaveera Rama Venkateswara v. Alawarasa Asari.

Lord Sumner.

gone into. It was the suit brought by Arumugam Chetti, of the village of Poomalaigundu, in the zemin of Gandamanaickanoor. The common state of facts was this. At some date, which varied a good deal from case to case, the ryot had made a well or tank at his own expense to water the land, which had been "punja" or dry land before, and thereafter, thanks to the water-supply, he resorted to garden cultivation. No permission for the working of these wells was required on the part of the zemindar. Rent had previously been paid at the rate of 4 fanams per guli, the usual "dry" rate: thenceforward, it was always demanded and paid at the rate of 8 fanams per guli, which was alleged to be the usual rate for "garden" cultivation. There seems to have been no demur to the 8 fanams rate till 1903, and presumably pottahs and muchalkas at this rate were regularly exchanged, in accordance with the Act.

Arumugam Chetti, the selected plaintiff, pleaded, rather indefinitely, that the field in question "was a punja land, bearing 4 fanams rate of assessment," but that since the well had been sunk "the defendant had been charging garden assessment," without having any right to do so. The zemindar did not deny the ryot's statements quoted above, but, besides relying on the actual payment of rent without dispute at the rate of 8 fanams, pleaded "a long-standing custom for the zemindar to collect *teerva* from the ryots according to the following rate: (1) from 8 fanams to 10 fanams per guli for garden cultivation, and that, "in the said zemindari, the *faisal* rates have been fixed in Fasli 1210 at 15 fanams per guli for garden cultivation." The record leaves the actual course taken at the trial on these pleadings somewhat conjectural.

The Sub-Collector rejected the zemindar's evidence of custom, and made decrees in favour of the ryots, observing that their lands were "lands formerly paying punja rates (4 fanams)." He appears to have understood the custom pleaded by the zemindar to have been "a general custom to charge enhanced rents for garden crops, when raised by plaintiffs, irrespective of any improvement or alteration in the land made at plaintiffs' expense," and he held such a custom to be bad in law, as being contrary to the policy of the Act, relying on the case of *Venkatagiri Raja* v. *Pitchanna* 1, and *Fischer's case* 2. There is nothing in his

1. (1886) I. L. R. 9 M. 27. 2. (1897) I. L. R. 21 M. 186.

P. C.

Raja Jagaveera Rama Venkateswara v. Alawarasa Asari.

Lord Sumner.

judgment to show, that a contract, existing before the wells were made, for a rent at the dry rate of 4 fanams was either expressly proved on the one hand, or expressly questioned on the other, but there is good ground for thinking that the case could not have taken the course it did, unless the zemindar had conceded the existence of such a contract before the wells were made, and had alleged its supersession by another contract, since the payments at the garden rate began. In the High Court on the first hearing, Subramania Aiyar, J., says in terms that, "In the Lower Courts the parties throughout proceeded in all these cases on the footing, that there were no facts to try, except as to the existence of the alleged custom," and then proceeds to discuss the validity of such a custom, and whether or not the alleged contract to pay at the 8-fanam rate was or was not *nudum pactum*. This is only consistent with his having taken the view above stated of the course of the case at the trial on the arguments presented to the Court. Twenty-seven of these suits were appealed to the District Judge. In these cases the maximum period since the wells were made and payment of the garden rate of rent began was eighteen years. Eleven others, in which the period was over forty years, and therefore went back to a date before the passing of Act VIII of 1865, had been reserved by the Sub-Collector for separate trial.

The District Judge allowed these appeals and made an order for a remand. On appeal to the High Court there was a difference of opinion on the first hearing, and on a second, under S. 15 of the Letters Patent, the order of the District Judge was affirmed and the cases were sent back to the Sub-Collector. It is important to observe two things: (1) the zemindar had not appealed against the order as actually made by the District Judge; he appears to have been satisfied with it as it stood, whatever its true meaning and effect might be; (2) the High Court interpreted that order as meaning merely that the Sub-Collector ought to try the question, whether a presumption of the fact of an implied contract arose in any particular case, on the facts of that case, and declared that "Under the order of remand it is not competent to either party to reopen the question of custom raised in the first preliminary issue." Accordingly, neither on the remand nor in the subsequent proceedings until the appeal to their Lordships' Board has this

P. C

Raja Jagaveera Râma Venkateswara v. Alawarasa Asari.

Lord Sumner.

question of custom been further raised. As now the appellant acquiesced in its being thus disposed of, and as the judgment appealed against accordingly does not deal with it, their Lordships cannot now entertain this point as a ground of appeal. It is enough to say that, if the custom was meant to refer to the determination of rates of rent "according to local usage," the evidence was irrelevant, unless and until it appeared that no contract, express or implied, had been made on the subject; and if, on the other hand, it was meant to be, as the Sub-Collector understood, a general custom to enhance rent if the tenant enhanced the value of the land at his own expense, then the zemindar was asking the Sub-Collector to do what the Act forbade him to do, at any rate when in the last resort, and in default of proof of contract or of "warum," he came to fix a rent which he considered to be just. It never appears to have been suggested that what was meant was a custom of the country, with reference to which the ryots or their predecessors must be deemed to have contracted when they began to occupy the land in the first instance, or that the zemindar's claim was merely to have the original contract applied to new circumstances according to its terms, and was not a claim to alter those terms, and to imply a new contract for that purpose.

The hearing upon the remand took place in 1907. By this time seventeen of the thirty-eight suits of 1903 had been disposed of, or in some way had disappeared; but further suits had been brought for 1904 and 1905, respectively thirty-one and thirty-eight. Thus ninety suits were eventually dealt with; but again the suit of Arumugam Chetti was treated as typical of all, though he had "paid this enhanced rate for the first and only time in Fasli 1311, the year before suit" (Record, p. 185). Again the Sub-Collector decided for and the District Judge against the ryots, though neither Sub-Collector nor District Judge was the same person who had officiated before. Again, on appeal to the High Court, the ryots succeeded, and now it is the zemindar who appeals to their Lordships' Board.

The judgment of the High Court, now appealed against, says, "in the present suits it is admitted that, prior to the construction of the wells, the tenants had always been paying the uniform punja rate of 4 fanams a guli for the suit lands, and this as far back as can be traced." From such facts it would

P. C.

Raja Jagaveera Rama Venkates wara v. Alawarasa Asari.

Lord Sumner.

be a legitimate inference that a contract to hold the lands at a 4-fanam rate of rent might be implied, and, when this is taken in conjunction with the terms of ryoti tenure, such a contract has at any rate an element of fixity, since so long as the ryot's rent is paid the zemindar cannot dispossess him against his will. It need not necessarily be inferred that such an implied contract gives a right of occupation at the punja rate in perpetuity. It would be enough for the purpose of the present case if its duration is implied to be so long as circumstances affecting the holding remain unchanged, otherwise than by the labour and outlay of the ryot himself. This is the basis of the decisions in favour of the ryots. How then is another and subsequent contract to be implied replacing the contract at the "dry" rate by a new one at the "garden" rate? The District Judge found as a fact, at the second hearing in his Court, that, in view of the long continuance of payments of rent at the garden rate, "in each and every case there was an implied contract to go on paying those rates, if not as long as the relationship of landlord and tenant continued, certainly as long as the conditions remained unchanged," and on this Ayling, J., delivering the judgment of the High Court, which is now under review, says—

"The existence of an implied agreement is deduced mainly from the payment of the enhanced rate by the litigating tenants for a number of years varying from two to forty. The corroborative evidence is meagre, but I am not prepared, on second appeal, to set aside the District Judge's finding in this respect."

The question for their Lordships then comes to be that of consideration for the subsequent agreement at garden rate thus implied. What is this consideration to be? The mere letting of the land by the landlord will not do, for it was let at the dry rate already, and the ryot was entitled to continue in occupation at that rate, and no fresh consideration therefore moved from the landlord for the ryot's assumed promise to pay at the 8-fanam rate. The District Judge appears to have found consideration in the landlord's abstention from exercising his right to resort to the "warum" system, if the ryot refused to consent to pay at the rate of 8-fanams, but, under the Act, if there was an implied contract for the 4-fanam rate, that contract had to be enforced, and there was no question of resorting to the "warum" system. By the admissions, such an implied contract did exist. As, by consent, all the cases have been treated as typified sufficiently by Arumugam Chetti's case, no

P. C.

Raja Jagaveera Rama Venkateswara v. Alawarasa Asari.

Lord Sumner.

point can be made that in the cases where the 8-fanam rate had been paid for over forty years, the question arose before the Act of 1865 was passed ; but, even if it could, there is no evidence that there was any "warum" in the village in question. If it be said that at any rate the landlord could have put the tenants to the trouble of proceedings in the Sub-Collector's Court and forbore to do so, there is no evidence that there was actually any such forbearance. Besides, if he had done so, still by the hypothesis, proof of the implied contract for the dry rate would have promptly defeated him, nor can it be said that a valid consideration can be found for the abandonment of the ryot's rights in the zemindar's submission not to raise a hopeless and groundless dispute of those rights, any more than a promise to pay a sovereign in satisfaction of a debt of a guinea is supportable by the consideration that it saves the creditor the trouble of bringing an undefended action for the larger sum.

The High Court therefore concluded that the implied agreement to pay the 8-fanam rate, though found as a fact, could not be enforced for want of consideration, and accordingly, if the contract to pay the 4-fanam rate still stood, it was enforceable. Some contention was raised that the ryots were estopped by their conduct in paying the garden rate, but this estoppel in pais, for what it might be worth, rested on an implied representation of some existing fact, on the faith of which the zemindar had changed his position, and of this there was no evidence. The contention was really only the implied contract for the garden rate in another form. A further argument has been advanced, turning on the supposed true intent of the original contract for the 4-fanam rate, namely, either that it was a promise to pay the 4-fanam rate so long as the land should remain dry, and then, if garden cultivation should take place, to determine that contract, leaving the parties to make a new one, express or implied, and in default to resort to the "warum" system, or else, in the alternative, that there never had been two implied contracts, but really from the beginning only one, to the effect that the ryot would pay at the 4-fanam rate for the land while dry, and at the 8-fanam rate or some appropriate garden rate for the land when under garden cultivation, no matter at whose expense the water-supply should be

P. C.

Raja Jagaveera Rama Venkateswara v. Alawarasa Asari.

Lord Sumner.

procured, and this, as the legal result of this tenure having originated historically, as it is said, in a division of the produce of the holding, such as it might be from time to time, between ryot and zemindar in accustomed proportions. To both arguments there must be the same answer. The zemindar throughout contended for a new contract, arising in each case when the 8-fanam rate first began to be paid, and this is what the District Judge found and the High Court accepted. No case was made below, when the facts were examined or admitted, that the question was merely one of applying a very ancient agreement to new circumstances in accordance with its terms; nor would it be easy, to say the least of it, to suppose that any ryot voluntarily agreed to have his rent enhanced, whenever his own outlay should have rendered an improved mode of cultivation possible. Furthermore, such a theory, if applicable at all, is of general application and is repugnant to the whole scheme of Act VIII of 1865, which is based on the idea of making contract paramount, even when it is only implied, and of recognising agreed rents in supersession of division of the produce, which is to be resorted to only if no contract for a rent can be proved and if the fixing of rent according to the local rate is objected to.

In the result the whole case now turns on the question whether there was any consideration for the new promise to pay at the rate of 8 fanams for land, which was already held on a binding contract of tenancy at the rate of 4 fanams per guli. Their Lordships agree with the High Court that the answer must be "none". If the cases had been examined separately, if distinctions had been drawn between cases where the higher rate was paid for forty years and cases where it was only paid once or twice, if the possibility of presuming a lost pottah at 8 fanams or lost proof of consideration had been mooted, if the origin of these tenancies had been investigated and the terms of the original contracts fully discussed, other questions might possibly have arisen. As it is, their Lordships must deal with the case as they find it. They will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitor for Appellant :—*Douglas Grant.*

Solicitors for Respondents :—*T. L. Wilson & Co.*

A. P. P.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(In Insolvency Jurisdiction).

PRESENT:—MR. JUSTICE COUTTS TROTTER.

In the matter of Hajee Mohamed Habibulla Badsha Sahib. *An insolvent.**

Hajee Mohamed Habibulla Badsha Sahib

Criminal Procedure Code (V of 1989), S. 195 (1) (b) and (c)—Sanction for prosecution—Court granting sanction not to express any opinion on the merits of the case—Insolvency proceedings—Affidavit filed by claimant before Official Assignee—Sanction to prosecute claimant—Power of Court to grant.

The true interest of the accused requires that the judge who gives sanction should abstain from giving anything like an analysis of the materials submitted to him for the purpose, or expressing any opinion as to the probability or otherwise of a conviction. All that a judge in giving sanction is called upon to do is to feel that the matter is one which, on the face of it, requires investigation by a Magistrate.

Krishnamma v. *Chitturi Chinna Perraju* [1]. Relied on; observations of *Seshagiri Iyer, J.*, in *Palaniappa Chettiar* v *Ramaswami Chettiar*, [2] dissented from.

The High Court in the exercise of its insolvency jurisdiction, can sanction the prosecution of a claimant in insolvency proceedings, in respect of statements contained in an affidavit filed by him before the Official Assignee, in support of his claim. The claimant is a party to the proceedings before the court within the meaning of S. 195 (1) (c) of the Criminal Procedure Code.

An application for sanctioning the prosecution of two persons for offences under Ss. 193 and 465 of the Indian Penal Codes. The facts of the case are sufficiently stated in his Lordship's judgment.

The Court delivered the following

Judgment :—This is an application for sanctioning the prosecution of two persons for offences under Ss. 193 and 465 of the Indian Penal Code. Agreeing, as I do, with the views expressed by Napier, J. in *Krishnamma* v. *Chitturi Chinna Perraju* [1] and disagreeing with those of Seshagiri Aiyar, J. in *Palaniappa Chettiar* v. *Ramaswami Chettiar* [2], which observations, in my opinion, are dicta which were quite unnecessary to the case decided by the Bench on that occasion, I feel myself in very great difficulty as to what I should do in this case. I am satisfied that the true interest of the accused requires that the Judge who gives sanction should abstain from

* I. P. No. 112 of 1917. 18th September, 1918.

1. (1914) 17 M. L. T. 15. 2. (1916) 32 M. L. J. 54=20 M. L. T. 557.

Hajee Mohamed Habibulla Badhsa Sahib

giving anything like an analysis of the materials submitted to him for the purpose, or expressing any opinion as to the probability or otherwise of a conviction. I think that all that a Judge in giving sanction is called upon to do is to feel that the matter is one which, on the face of it, requires investigation by a Magisterial Court and ultimately by a competent tribunal. To my mind, it would be fatal to the interest of the accused person that it should be thought that, because an order of sanction has gone, the committing Magistrate should feel that the sanctioning Court has made up its mind that there is made out against the accused a *prima facie* case in the sense that would demand committal. That is the duty in my opinion of the Magistrate before whom the case is brought up and not of the Judge before whom the sanction is applied for; and I think that it is well put by Ayling, J., in *Palaniappa Chettiar* v. *Ramaswami Chettiar* (1) where he says "In effect by according sanction, it does not say to the Court which tries the case, 'This is a case which I think you will have to convict,' but: 'This is a case which I think it is worth your while to enquire into.'

That is the only view I express in sanctioning this prosecution.

Various points were taken: The first one was that the affidavit and the promissory note filed along with it which is the foundation for these proceedings was not done in a proceeding in a Court, on the ground that it was filed not before me directly but before the Official Assignee. In my opinion, the heading of the affidavit alone is enough to show that this was filed in this Court in a proceeding in this Court, although, as a mere matter of machinery, certain claims may be adjudicated upon by the Official Assignee as a Subordinate Officer of this Court. In any view, that point is absolutely unarguable. Then it is said that the sanction under S. 195 1 (c) Criminal Procedure Code is not for an offence committed by a party and therefore it does not fall within the scope of this section. In my opinion, a claimant who files a claim in an insolvency petition in this Court is a party to the proceedings. If his claim is disputed, he has to appear to support it and then a list is constituted between himself on the one

1. (1916) 20 M. L. T. 557 at page 559=32 M. L. J. 54.

Hajee Mohamed Habibulla Badhsa Sahib

hand and the Official Assignee as representing the estate of the debtor on the other. If his claim is rejected, and he is not satisfied with it, he appeals to the Court just like any other party in other proceedings. But, in any event, it is of no moment, because if he is not a party my sanction is not required. In case it is required I give it and if it is not it does not matter, but I should like to conclude by expressing once more my strong dissent from the view that a sanction given by this or any other Court is in any way tantamount to an intimation to the Magistrate that it is his duty to find that there is a *prima facie* case against the accused and commit him for trial. In my opinion his duty is simply what he should do in any other case, and sanction is only requisite to prevent a frivolous abuse of the powers of the Criminal Courts. I am satisfied that this prosecution is not that, and that is all I desire to say about it.

I sanction the prosecution in terms of the notice of motion.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE NAPIER.

Komuru Appalaswami and others ... *Appellants* (Plaintiffs Nos. 1, 3, and 4).*

v.

Palli Narayanaswamy, minor by guardian Alla Narayanamma and Alla Yerakamma and others ... *Respondents. (Defendants Nos. 2 and 3 and 1st Defendant's L. R.)*

Komuru Appalaswami v. Palli Narayanaswami.

Limitation Act S. 12—Appeal—Limitation—Time requisite for obtaining copies—Meaning—Application before vacation—Copy ready during vacation—Delivery taken on re-opening day—Gazette notification notifying arrangements for delivering copies during vacation—Period between date on which copy ready and date of delivery if to be excluded or included.

Where the application for copies of the decree and judgment to be appealed against was made before the summer vacation, the copies were ready on 21-5-17 during the vacation, but delivery thereof was taken only on 25-6-17, the re-opening day, though a notification had been published in the Gazette in accordance with Chapter XV Rule 12 of Rules and Orders for Civil Courts that in such

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* S. A. No. 1545 of 1917. 30th August, 1918.

Komuru Appalaswami v. Palli Narayanaswami

cases arrangements would be made for granting copies during the vacation, *held*, in a second appeal preferred against the said decree and judgment, that the period from 21-5-17 to 25-6-17 could not be considered as part of the period requisite for obtaining copies within the meaning of S. 12 of the Limitation Act and that appellant was not entitled to a deduction of the said period.

Nachiyappa Mudali v. *Aiyaswami Aiyar* [1] followed.

Second Appeal against the decree of the Court of the Temporary Subordinate Judge of Vizagapatam in A. S. No. 132 of 1915 (A. S. No. 49 of 1915 District Court, Vizagapatam) preferred against the decree of the Court of the District Munsif of Vizagapatam in O. S. No. 800 of 1912.

R. Narasimham for *B. N. Sarma* for the Appellants.

B. Narasimha Rao for the Respondents.

The Court delivered the following

Judgment:—This second appeal was filed 108 days, (excluding the time required for getting copies), after the date of the Lower Appellate Court's decree, and the delay of 18 days in presentation is explained by the intervention of the annual vacation. The copy was ready on the 21st day of May 1917 during the vacation, but delivery was not taken until the 25th day of June 1917, the re-opening day. The question is whether the period from 21st May 1917 to 25th June 1917 can be considered as part of the period requisite for obtaining a copy within the meaning of S. 12 of the Limitation Act.

Chapter XV, Rule 12 of Rules and Orders for Civil Courts lays down that arrangements shall be made by Courts for granting copies of judgments, decrees, etc., during the vacation provided that applications for such copies shall have been made before the adjournment and the attention of the Courts was drawn to this rule by a Circular of this Court, Dis. No. 1081, dated 2nd December 1902. In accordance with this rule a notification to the above effect was published in the Gazette. The appellant had therefore notice that arrangements would be made for granting the copy he had applied for. Had he exercised due diligence he could have obtained the copy on the 21st May 1917, and we are therefore of opinion that the time from 21st May 1917 to 25th June 1917 cannot be included in the period requisite for obtaining a copy. We are supported in this view

1. (1882) I. L. R. 5 M. 189 (F. B.)

Komuru Appalaswami v Palli Narayanaswami.

by the Full Bench ruling in *Nachiyappa Mudali Aiyaswami Aiyar* [1], which held that when an appeal was presented on the re-opening day after the vacation it was out of time because it could have been presented on a previous day on which the offices of the Court were open, but on which the Judge was not sitting, notice of which had been given in the Gazette. We have been referred to some decisions which deal with the exclusion of the Chirstmas holidays, but they are not applicable to the present case, for no notification is issued with regard to the Christmas holidays. It is then contended that the delay should be excused under S. 5 of the Limitation Act, but as appellant had his copy on 25th June 1917 and did not file his appeal until 29th August 1917 we cannot say that he had sufficient cause for not preferring the appeal in time. The reason given by him that he thought the period from 21st May 1917 to 25th June 1917 would be excluded from calculation is quite inadequate to account for the subsequent period of nearly seven weeks during which no action was taken.

The second appeal is out of time and is dismissed with costs.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE NAPIER.

P. Varadarajulu Naidu ... *Petitioner (Accused in C. C. No. 53 of 1918 on the file of the Sub-Divisional 1st class Magistrate, Madura division).*

Varadarajulu Naidu.

Criminal Procedure Code, S. 196—Scope and construction—Sanction to prosecute—What amounts to—Sanction to actual words of complaint not necessary.

It is not necessary, under S. 196, Criminal Procedure Code, that the actual words of the complaint should be sanctioned by the Government.

Chidambaram Pillai v. *Emperor* [2] referred to.

Where Government sent a telegram to a District Magistrate expressly authorising the Public Prosecutor of the District to file a complaint against V under S. 124 A.

Crl. R. C. No. 596 of 1918. 15th October, 1918.
(Crl. R. P. No. 482 of 1918.)

1. (1882) I. L. R. 5 Mad. 189.
2. (1908) I. L. R. 32 M. 3.

Varadarajulu Naidu *In re.*

I. P. C. and to act immediately if the District Magistrate thought it advisable after consulting him and directed the District Magistrate to submit the complaint prepared "for issue of Supplemental sanction," *held* that the authority given was a perfectly valid authority, that the words referring to the issue of 'supplemental sanction must be read apart from the rest of the order and did not intend to refer back to the first portion of the telegram or to limit the authority given and that a complaint filed in pursuance of the authority contained in the telegram but without any special sanction therefor was not open to the objection that it was not authorised by Government.

Per Napier, J.—S. 196 must not be construed with the strictness of an enabling section, but, as being a disenabling section, must be read simply as requiring the specific authority of Government for institution of the proceedings and nothing more. *Barindra Kumar Ghose* v. *Emperor* [1] dissented from.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898 and S. 107 of the Government of India Act, 1915, praying the High Court to revise the order dated the 26th September 1918 of the court of the Sub-Divisional Magistrate of Madura division on the objection petition in Calender Case No. 53 of 1918.

K. Srinivasa Aiyangar and *A. Krishnaswami Aiyar*, Vakils for the petitioner.

Public Prosecutor on behalf of the Crown.

The court made the following

Phillips, J.

Order :—*Phillips, J* :—The only point argued before us among the many objections taken in the revision petition, is that the complaint was filed without the authority of Government. A telegram was sent by Government to the District Magistrate (Ex. A) and it expressly authorised the Public Prosecutor to file a complaint against Varadarajulu Naidu under S. 124-A, Indian Penal Code. It further authorises him to act immediately if the District Magistrate thinks it advisable after consulting him, and this consultation does not refer as suggested by Mr. Srinivasa Aiyangar to the actual filing of the complaint. The last sentence of the telegram enjoins the District Magistrate to submit the complaint prepared " for issue of supplemental sanction." It is contended that these words modify the previous portion of the order and render the authority invalid. I, however, agree with the Sub-Divisional Magistrate that this last sentence must be read apart from the rest of the order, and does not intend to refer back to the first portion of the telegram or to limit the authority given. The

1. (1907) I. L. R. 37 C. 467.

Varadarajulu Naidu *In re.*

Phillips, J.

words "issue of" strengthen me in this view for if Government intended that no action should be taken until the complaint had been sanctioned those unnecessary words would not have been inserted in the telegram. *Chidambaram Pillai* v. *Emperor* [1], is authority for the proposition that the actual words of the complaint need not be authorised by Government. I have therefore no doubt but that the authority given by Government in Ex. A. was a perfectly valid authority. In view of the above, it is unnecessary to deal with the two cases cited, *i.e.*, *Barindra Kumar Ghose* v. *Emperor* [2], and *Queen Empress* v. *Samavier* [3], the former which decided a point which does not arise here and the latter a question under S. 197, Criminal Procedure Code, the language of which is entirely different from S. 196. I would therefore dismiss this petition.

Napier, J.

Napier, J:—I agree. I only wish to add a few words on what I conceive to be the scope of S. 196 of the Criminal Procedure Code. Mr. K. Srinivasa Aiyangar invited our attention to the language used by the learned Judges in *Barindra Kumar Ghose* v. *Emperor* [2]. It appears to me, that they treated S. 196 as an enabling section. With the greatest deference I entirely differ. S. 196 is not an enabling section. It is a disenabling section. The enabling section is S. 190. S. 190 provides that a Magistrate may take cognizance of any offence (*a*) upon receiving a complaint of facts which constitute such offence ; (*b*) upon a police-report of such facts ; and (*c*) upon information received otherwise or from his own knowledge. Then there are Ss. 195, 196 and 197 which limit the power of a Magistrate to take cognizance in this general manner. What the code does is to provide that any person who has knowledge of an offence being committed can set the Criminal Court in motion ; but that with regard to matters dealt with in S. 196, the Criminal Court shall not be set in motion without a complaint. This provision eliminates clauses 2 and 3 of S. 190 and further provides that the complaint shall be either by order of, or under authority from, the Governor-General in Council or the Local Government. Therefore in my opinion, the question whether this section should be read in the interest of the accused or to what extent discretion is allowed or to what

1. (1908) I. L. R. 32 M. 3=19 M. L. J. 81. 2. (1907) I. L. R. 37 C. 467. 3. (1892) I. L. R. 16 M. 468.

Varada-rajulu Naidu *In re.*

Napier, J.

extent Government is to be guided by questions of policy, have, with deference to the learned Juges no bearing on the question at all. All that it requires is that whereas ordinarily anybody can give information of an offence and the proceedings then go on in the name of the Crown against the accused person, in this particular case only the Government can set the Court in motion. And it is, I think, in view of the generality of the language used in this section that this court and the High Court of Bombay have given a wide interpretation to the section. This court, in *Chidambaram Pillai* v. *Emperor* [1] expressly approved of the language used in *Queen Empress* v. *Bal Gangadar Tilak* [2] and that language seems to me to indicate the true manner in which the construction of this section should be approached. It is as follows : "Now as to the question of jurisdiction, we are all of opinion without doubt that this prosecution was instituted under the authority of Government, and that to use the words of the present Code (X of 1882) this complaint was made "by order of or under the authority of Government." There is no special mode laid down in the code whereby the order of sanction of Government is to be conveyed to the officer who puts the law in motion. In this case the prosecution was conducted by the Government Solicitor, it was instituted by the Oriental Translator to Government, and he produced the written order of Government to institute the complaint. Now, though the complaint must undoubtedly contain the article complained of to give information to the accused of the charge against him, there is nothing in the Code to show that the written order to make the complaint if written order is required, must specify the exact article in respect of which the complaint is to be made. That appears to have been the view taken in *Chidambaram Pillai* v. *Emperor* [1], because in that case we find the language of the order is, "The Madras Government authorises the institution of Criminal proceedings against Chidambaram Pillai, Subramania Siva and Padmanabha Aiyangar under Ss. 124 A, 153 A and 505, Indian Penal Code, in respect of speeches delivered by them at Tuticorin and Tinnevelly, in the months of February and March 1908." So, the only thing definite in the order is the persons, the sections, and the dates *within which* the speeches

1. (1908) I. L. R. 32 M. 3=19 M. L. J. 81. 2 (1897) I L. R. 22 B. 150.

Varadarajulu Naidu In re.

Napier, J.

were made. These two cases seem to me clearly to indicate that this section must not be construed with the strictness of an enabling section, but as being a disenabling section must be read simply as requiring the specific authority of Government for institution of the proceedings and nothing more.

A. S. V.

PRIVY COUNCIL.

PRESENT :—LORD ATKINSON, LORD PHILLIMORE, SIR JOHN EDGE AND MR. AMEER ALI.

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Choudhri Gur Narayan and others ... *Appellants.**

v.

Sheo Lal Singh and others ... *Respondents.*

P. C.

Choudhri Gur Narayan *v.* Sheo Lal Singh.

Benamidar, position of—Benamidar can maintain an action without joining real owner—Person beneficially entitled, whether bound by suits by or against benamidar—Transactions with Hindu females—Duty of purchasers from them to ascertain the extent of their powers—Contingent reversioner cannot bind his expectancy by joining in deed of sale—Doctrine of feeding the estoppel inapplicable.

A benamidar represents the real owner, and so far as their relative legal position is concerned is a mere trustee for him. An action can be maintained in the name of the benamidar in respect of the property that stands in his name although the beneficial owner is no party to it. It is open to the latter to apply to be joined in the action: but whether he is made a party or not, a proceeding by or against his representative in its ultimate result is fully binding on him.

It is the duty of a person dealing with a Hindu female to acquaint himself with the extent of her powers.

In a sale by a Hindu female her grandson, who was a contingent reversioner, joined, and purported to dispose of his future interest.

Held, that his association in the deed of sale was wholly futile and had no legal effect in validating the transaction if otherwise invalid.

Consolidated appeals from four decrees of the Calcutta High Court, dated July 11, 1910, passed on appeal from four decrees of the Subordinate Judge of Gaya.

These four appeals all related to certain sales made by a Hindu female, Maha Sundar Koer, of property which she held as a Hindu mother only. Two of them were compromised: the two which remained were those in which Mahanth Thok Narayan Puri and Musammat Kunwar and others were respectively respondents, they being the purchasers from Maha Sundar Koer whose title as such was impeached by appellants, the purchasers from the reversioners.

The High Court dismissed the suits in part on two grounds : (*a*) that Mohesh Lal who had purchased a half share in certain properties subject of one of the suits from the reversioners, was a mere

* June 6, 7 and Oct. 17, 1918. P. C. Appeal No. 21 of 1916.

P. C.

Choudhri Gur Narayan v. Sheo Lal Singh.

benamidar for one Rafiuddin, and could not maintain an action in the absence of the latter, (*b*) that in the other suit plaintiffs were purchasers from Hanuman Sahai, a reversioner, and were estopped by their vendors having joined in the sale-deed and purported to convey his future interest.

The plaintiffs in these suits preferred the present appeals. A fuller account of the facts will be found in their Lordships' judgment.

De Gruyther, K. C., (with him, *Dunne, K. C.*, and *Dr. Majid*) for appellants, submitted that Mohesh Lal was not a benamidar at all, but that even if he was, he could sue. Upon the que stion whether a benamidar can sue there is a conflict of authority in India: vide Mayne's Hindu Law, paras. 441, 449.

In Calcutta it has been held a benamidar cannot sue in ejectment : *Hari Gobind Adhikari* v. *Akhoy Kumar Mazumdar* [1], *Issur Chandra Dutt* v. *Gopal Chandra Das* [2], *Mohendra Nath Mukerjee* v. *Kali Prasad Johuri* [3].

Between the first and second of these cases the contrary view was taken by the Allahabad High Court in *Nand Kishore Lal* v. *Ahmad Ata* [4], where the matter is considered at length. To the same effect is *Yad Ram* v. *Umrao Singh* [5].

(*Dunne* referred to *Raja of Deo* v. *Abdullah* [6], a recent case in which the Board held that the real owner was bound by the benamidar's act.)

The same principle is set out in S. 41 of the Transfer of Property Act.

In *Yad Ram* v. *Umrao Singh* [5]. Stanley, C. J. reviews all the cases: he sums up at p. 384 : I submit the view he takes is the correct one The ruling in *Hari Gobind Adhikari* v. *Akhoy Kumar Mazumdar* [1], was based on an erroneous view of this Board's decision in *Gopeekrist Gossain* v. *Gungapersad Gossain* [7], which simply recited an opinion of Sir Edward Ryan drawing a distinction between lands and bonds.

(*Mr. Ameer Ali* referred to S. 317 of the old Civil Procedure Code, which, he said, was based on the existing practice of the Courts.)

The Bombay High Court have taken the same view as Allahabad : *Ravji Appaji* v. *Mahadeo Bapuji* [8], *Dagdu* v. *Balwant Ramchundra* [9]. In Madras the early decisions support Allahabad and Bombay. *Shangara* v. *Krishnan* [10], *Ramanuja* v. *Sadagopa* [11]. But in

1. (1889) I. L. R. 16 C. 364, 366.
2. (1897) I. L. R. 25 C. 98.
3. (1902) I. L. R. 30 C 265.
4. (1895) I. L. R. 18 A. 69.
5. (1899) I. L. R. 21 A. 380.
6. (1918) L. R. 45 I. A. 97.
7. (1856) 6 M. I. A. 53.
8. (1897) I. L. R. 22 B. 672.
9. (1897) I.L.R. 22 B. 820.
10. (1891) I. L. R. 15 Mad. 267.
11. (1904) I. L.R. 28 M. 205.

P. C.

Choudhri Gur Narayan v. Sheo Lal Singh

Kathaperumal Rajali v. *Secretary of State* [1], Subramania Ayyar and Wallis, JJ.—took the contrary view: they held that a benamidar could sue on a mortgage or a bond, but not in ejectment, on the ground that he is a mere name lender and has no title at all.

There is a later case at Allahabad *Rachha* v. *Gajadhar Lal* [2], which follows the two previous decisions.

The view held by the Calcutta High Court was originally based on the misunderstanding referred to.

(*Mr. Ameer Ali*: In Bengal a benamidar is always called farrzidar: a man who has got a title by construction of law. It is a case of resulting-trust.)

That there was an error is admitted by Banerji, J., himself in *Mohendra Nath Mookerjee* v. *Kali Prasad Johuri* [3]. Even at Calcutta the practice has not been uniform. In *Bhola Pershad* v. *Ram Lal* [4], *Gopi Nath Choby* v. *Bhugwut Pershad* [5], and other cases, including an unreported one in 1909, benamidars *did* sue; so even at Calcutta there is no uniform law forbidding it. Going back to the earliest case on the subject, *Prasunno Coomar* v. *Gooroo Churn Sen* [6], the reason for not allowing the benamidar to sue is that the real owner would not be bound: if that reason goes, there is no logical reason against it.

As to estoppel, the law is not that where I have sold a title of one sort and than get a totally different title, I am bound to convey it: that was the case here. The deed shows what Hanuman Sahai conveyed: it was his interest as heir to Bhavani Kunwar.

(*Mr. Ameer Ali* : A mere *spes successionis* ?)

Yes, an expectancy: a right not capable of sale or transfer. What he has sold to my clients is what he subsequently bought himself. Even if he had benefited by the deed under which respondents claim, he might justly say: I sold an expectancy and got the price of an expectancy, and that expectancy has never materialised.

The respondents did not appear.

Their Lordships' judgment was delivered (October 17, 1918) by

Mr. Ameer Ali.

Mr. Ameer Ali. This consolidated appeal from a judgment and four decrees of the High Court of Calcutta arises out of four suits brought by the plaintiffs in June 1906 in the Court of the First Subordinate Judge of Gaya. The object of the suits was to obtain possession of certain specific landed properties which originally belonged to one Ram Dyal Singh, who

1. (1906) I. L.R. 30 Mad. 245.
2. (1904) I. L. R. 28 All. 44
3. (1902) I. L. R. 30 C. 265 at p. 272
4. (1896) I. L. R. 24 Cal. 34.
5. (1884) I. L. R. 10 Cal. 697, 705
6. (1865) 3 Suth. W. R. 159.

P. C.

Choudhri Gur Narayan v. Sheo Lal Singh.

Mr. Ameer Ali.

died so long ago as 1845. These four actions were separately decreed by the Subordinate Judge. On the defendants' appeals the High Court dismissed two of the suits and in the two others varied the first Court's decrees. The plaintiffs preferred four appeals to their Lordships' Board which were subsequently consolidated. After the appeals were filed two of the suits were compromised. The present appeal is thus confined to the two decrees of the High Court in Suits 99 and 101 of 1906 respectively. A short statement of the facts relating to this family will explain the nature of this litigation.

Ram Dyal had left him surviving a widow named Birja Kunwar and two married daughters named respectively Sham Sunder Koer and Maha Sundar Koer It is stated that before his death he had made an oral disposition by which he had devised the bulk of his property to his two grandsons, one named Ajodhya, the son of Sham Sundar, and the other Sheo Charan, the son of Maha Sundar, subject to a life interest in his widow Birja Kunwar.

Both the Courts below have found in favour of this disposition, and it may now be accepted as undisputed that the two grandsons under Ram Dyal's will obtained vested interests in the properties specifically devised to them. The villages which form the subject of the four suits were given to Sheo Charan. Birja Kunwar died in 1851, and on her death the properties devised to Ajodhya and Sheo Charan vested in them absolutely. Sheo Charan died in 1852, and on his death the villages devised to him under the will of his grandfather came into the possession of Maha Sundar Koer by virtue of her right to succession as a Hindu mother. Maha Sundar purported to deal with these properties in her life-time; she borrowed money on mortgages, created mokarraris, and sold several of the villages. Two of the sales form the subject of dispute in the present appeal.

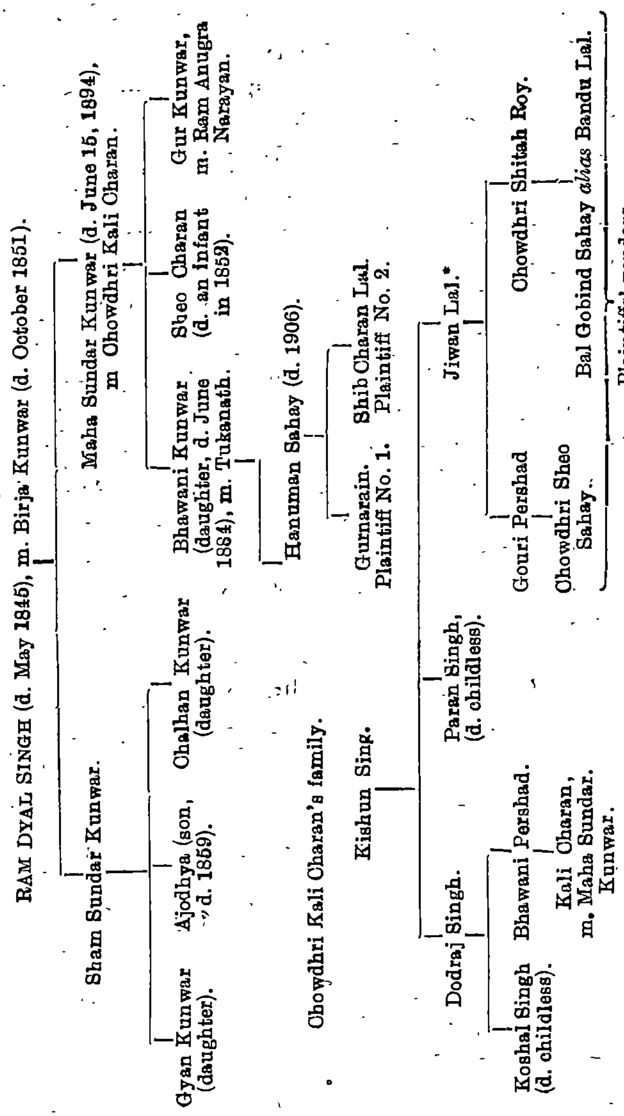
Maha Sundar died on the 15th June, 1894, when the succession opened to Sheo Charan's agnatic relations The plaintiffs claim to have derived title under assignments from the reversioners, and their case is that the alienations made by Maha Sundar in her life-time in favour of the defendants or their predecessors are invalid, as they were not made for purposes which make them binding on the reversioners. And they

P. C.

Choudhri Gur Narayan v. Sheo Lal Singh.

Mr. Ameer Ali.

accordingly seek to recover possession of the villages purported to have been sold by her to the defendants or their predecessors-in-title. They in their written statements in the two suits raised a number of objections which, in the course of the trial, resolved themselves into the three main points which their Lordships have to determine on this appeal. The relative position of the parties and the nature of these objections will appear from the following pedigree :—



* Jiwan Lal had three other sons, one of whom alone left issue, but his descendants at the time of Maha Sundar's death were more remote to Sheo Charan than the plaintiff's vendors.

It will be seen from this pedigree that Sheo Charan's father, Kali Charan, had a grand-uncle of the name of Jiwan Lal. Jiwan Lal's two grandsons, Sheo Sahay and Bal Gobind Sahay, were admittedly the nearest male agnates of Sheo Charan, surviving at the time of Maha Sundar's death in 1894. It will be observed also that Maha Sundar had a daughter, Bhawani Kunwar, who was married to one Tukanath. She appears to have died in 1884, leaving her surviving a son, Hanuman Sahay, and on the 30th April, 1895, Sheo Sahay and Bal Gobind Sahay, as the nearest reversioners, conveyed all their right, title, and interest in the properties in suit to Hanuman Sahay. Hanuman died in February 1906, leaving him surviving the plaintiffs, Gurnarain and Sheo Charan, his sons and heirs. On the 2nd July, 1906, Gurnarain and Sheo Charan conveyed a half share of their interest in the said properties to one Mohesh Lal, and these three persons brought the four suits against the different alienees of Maha Sundar for setting aside her transactions and for recovery of possession. The defendants among other pleas challenged the right of Mohesh Lal to maintain the action in respect of his share as he was only a benamidar for a person named Rafiuddin. Secondly, they contended that as Hanuman Sahay was a party to the conveyance by Maha Sundar in respect of Mouzah Amhara, he and his heirs were estopped from questioning that particular transaction. And they pleaded generally that all the transactions that were impugned were entered into for justifiable necessity.

The Trail Judge held against the defendants on all points, and made a decree in favour of the plaintiffs. The learned Judges of the High Court of Calcutta, on the appeal of the defendants, have taken a different view. They have held, firstly that as Mohesh Lal is alleged to be a benamidar, his claim in respect of the moiety claimed by him must be dimissed.

They also held, differing from the Trial Judge, that in respect of the village of Amhara, Hanuman Sahay being a party to the transaction, his heirs, the plaintiffs, were estopped from disputing the validity of the sale.

With regard to the three villages involved in suit 101, they came to the conclusion that a part of the consideration for the sale was proved to have been applied in the payment of debts due from the estate. They accordingly dismissed the claim of the plaintiff No. 3 in suit No. 101, and made a decree in favour

P. C.
Choudhri Gur Narayan v. Sheo Lal Singh.
Mr. Ameer Ali.

of the plaintiffs 1 and 2 in respect of half of the property conditioned on their payment of 7,500 rupees with interest at 12 per cent. per annum to the representatives of the original purchaser, Jai Lal, they on their part accounting for the profits "enjoyed by them in respect of that half."

On the question whether a person who has no beneficial interest in the property which stands in his name or is acquired in his name can maintain an action in respect thereof, there seems to be considerable diversity of judicial opinion in India. The system of acquiring and holding property and even of carrying on business in names other than those of the real owners, usually called the benami system, is and has been a common practice in the country. There is nothing inherently wrong in it, and it accords, within its legitimate scope, with the ideas and habits of the people. The rule applicable to benami transactions was stated with considerable distinctness in a judgment of this Board delivered by Sir George Farwell (*Bilas Kunwar* v. *Dasraj Ranjit Singh*) 1. Referring to a benami dealing, their Lordships says :—

" It is quite unobjectionable and has a curious resemblance to the doctrine of our English law that the trust of the legal estate results to the man who pays the purchase-money, and this again follows the analogy of our common law that where a feoffment is made without consideration the use results to the feoffor."

So long, therefore, as a benami transaction does not contravene the provisions of the law the Courts are bound to give it effect. As already observed, the benamidar has no beneficial interest in the property or business that stands in his name ; he represents, in fact, the real owner, and so far as their relative legal position is concerned he is a mere trustee for him. Their Lordships find it difficult to understand why, in such circumstances, an action cannot be maintained in the name of the benamidar in respect of the property although the beneficial owner is no party to it. The bulk of judicial opinion in India is in favour of the proposition that in a proceeding by or against the benamidar, the person beneficially entitled is fully affected by the rules of *res judicata*. With this view their Lordships concur. It is open to the latter to apply to be joined in the action ; but whether he is made a party or not, a proceeding by or against his representative in its ultimate result is fully binding on him. In case of a contest between an alleged benamidar and an

1. (1915) L. R. 42 I. A. 212=29 M. L. J. 335=37 All. 557

P. C.

Choudhri Gur Narayan v. Sheo Lal Singh.

Mr. Ameer Ali.

alleged real owner, other considerations arise with which their Lordships are not concerned in the present case. Here the learned Judges of the High Court, differing from the Trial Judge, have held that there were grounds for 'supposing, or rather suspecting, that the purchase by Mohesh Lal of a moiety of the villages in suit was for the benefit of Rafiuddin, and as he did not join in the action they dismissed Mohesh Lal's claim. Mohesh Lal had persistently denied the defendant's allegation that he was a benamidar for Rafiuddin and had no beneficial interest in the property; nor does Rafiuddin appear to have put forward a claim adversely to Mohesh Lal. In these circumstances it appears to their Lordships that the decree of the High Court dismissing his claim in both suits on the ground that as a benamidar he was not entitled to maintain the actions is unsustainable

The High Court further held that the plaintiffs are estopped from questioning the sale by Mahasundar of the 8-annas share of Amhara, as Hanuman Sahay was a party to the transaction This village forms the subject of suit 99 of 1906. In support of their view the learned Judges have relied on the provisions of S. 115 of the Indian Evidence Act and the general doctrine of equitable estoppel embodied in that section, to which their Lordships will presently refer. The High Court also considered that Hanuman Sahay's purchase from the reversioners accrued to the benefit of Mahasundar's vendees in consequence of the fact that he had joined with her in conveying the property to the predecessors of the defendants. And they rested their judgment on the equitable doctrine of what is called "feeding the estoppel," and on the provisions of S. 43 of the Indian Transfer of Property Act (IV of 1882), which practically reproduces this rule.

To consider how far the learned Judges are right in their view on the question of estoppel, it is necessary to examine the clause in Mahasundar's conveyance which is said to create the estoppel. It bears date the 19th March, 1880, and, as already observed, purports to be executed by Mahasundar in conjunction with her daughter, Bhawani Kunwar, and the grandson, Hanuman Sahay. The description of the vendors is in the following terms:—

"We are Mussummat Mahasundar Kunwar, younger daughter and heiress of Mussummat Birja Kunwar, deceased, widow and heiress of Babu Ramdayal Singh,

P. C.

Choudhri Gur Narayan v. Sheo Lal Singh.

Mr. Ameer Ali.

deceased, inhabitant of mouzah Jagarnathpur pergunna Maher, and at present of mouzah Sugrigrandi, pergunnah Pachrukhi; Mussummat Bhawani Kunwar, eldest daughter of Mussummat Mahasundar Kunwar aforesaid and Chowdhri Hanuman Sahai, son of Mussummat Bhawani Kunwar aforesaid and grandson by daughter of Mussummat Mahasundar Kunwar aforesaid, all inhabitants of mouzah Sambri, pergunnah Rob, district Gaya, by occupation zamindars."

The deed then goes on to say as follows :—

"Whereas the entire 16 annas of mouzah Amhara, appertaining to lot Sugrigandi . . . . has been and is in the possession of me, Mussummat Mahasundar, susequently I, Mussummat Mahasundar Kunwar, had granted in gift mouzahs Sugrigrandi, Kulna Surajpura, Amhara, Harna Sikaria, Buksouti, Ghazipur, and Bahpuri Majrahi, appertaining to the said lot Sugrigrandi, to Mussummat Bhawani Kunwar, my eldest daughter, and Mussummat Gir Kunwar, my youngest daughter, with a view to avoid future disputes under deeds of gift dated the 28th August, 1860 . . . . in equal shares of 8 annas, with conditions that during the life-time of mine, Musummat Mahasundar Kunwar, I shall continue in possession of the same, and that after the death of me, Mussammat Mahasundar Kunwar, Mussummat Bhawani Kunwar should get possession of 8 annas and Mussummat Gir Kunwar of the other 8 annas. But the said Mussummat Gir Kunwar died in 1862 and Babu Ram Anugrah Narayan, husband of the said Mussummat Gir Kunwar, deceased, instituted a suit in the Civil Court of Gaya in respect of 8 annas of the said mouzahs, and fought the case from the District Court to the Privy Council, and according to the final judgment of the Privy Council, dated the 27th June, 1873, it was held that I, Mussummat Mahasundar Kunwar, one of the executants, should remain in possession of all the aforesaid properties; that after the death of me, Mussummat Mahasundar Kunwar, I, Mussummat Bhawani Kunwar, eldest daughter, should obtain possession of 8 annas, and Babu Ram Anugrah Narayan, husband of Mussummat Gir Kunwar, deceased, should obtain possession of the other 8 annas' share. In accordance with the same, I, Mussummat Mahasundar, am in possession of 16 annas up to this time, and I, Mussummat Bhawani Kunwar, eldest daughter, and after me Chowdhri Hanuman Sahai, son of me, Mussummat Bhawani Kunwar, are entitled to take possession of 8 annas, mentioned in the deed of gift, as absolute proprietor after the death of me, Mussummat Mahasundar Kunwar. . . . Therefore we, Mussummat Bhawani Kunwar and Chowdhri Hanuman Sahai, have absolutely sold and vended our future proprietary interest and right to possession in 8 annas out of 16 annas of the said mouzah Amhara, in which we, Mussummat Bhawani Kunwar and Chowdhri Hanuman Sahai, have acquired the right of possession after the death of Mussummat Mahasundar Kunwar, and I, Mussummat Mahasundar Kunwar, have absolutely sold and vended my life-interest to obtain possession in 8 annas of mouzah Amhara, in short, all the right, title, and interest of us, the executants, in the 8 annas of the said mouzah Amhara."

It is to be noticed that in this document Mahasundar makes no reference to the fact that the properties were in her possession as a Hindu mother by right of succession to her son Sheo Charan. She describes herself as the "daughter and heiress" of her mother, Birja Kunwar, and claims to be absolutely entitled to the property in question, and purports to deal with it as such It cannot be said that this misdescription or

P. C.

Choudhri Gur Narayan v Sheo Lal Singh.

Mr. Ameer Ali

assumption of absolute ownership could possibly have misled the purchaser. For the proceedings in the suit of Anugrah against Mahasundar and the decision of this Board *Ramanugra Narain* v. *Mahasundar Kunwar* [1], are recited in the conveyance in question. Their Lordships in that case expressly confined the adjudication to the parties to the suit. They did not enter upon a consideration of the question whether Mahasundar had the power to make the gift or gifts which were in controversy in that action. The declaration made by the Board could not enlarge the power of Mahasundar to deal with the properties she held as the heiress to her son to the prejudice of the son's reversioners. The vendee was entering into a transaction with a Hindu female. It lay upon him to acquaint himself with the extent of her powers. He was in full possession of the proceedings in Ram Anugrah's suit and the facts connected with the Mitakshara family. The evidence of his witnesses shows that enquiries were made on his behalf and that he had even some legal advice. Whether these measures were adopted with the object of creating grounds of defence in some future action by reversioners or were *bona fide* enquiries, their Lordships have little doubt on the facts that the Mahant purchaser had full knowledge of the powers and disabilities of the vendor. At this time Hanuman had no interest of any kind in the property. Mahasundar had held it as a Hindu mother by right of succession to her son Sheo Charan On her death it would pass to his heirs. Hanuman's mother was alive at the time of the sale ; whatever interests they had were of a purely contingent character, It is quite evident that they were joined as parties to the conveyance as the instance of the vendee as a piece of precaution. Whether the vendee entered into the transaction in the belief that Mahasundar's title was derived, as she described in the sale-deed, from her mother, or whether he knew, as is more probable from the circumstances, that she was in possession of the property as heiress to her son, he must have known that Hanuman had no assignable interest which he could convey or the assignment of which he could assure to the purchaser. His interest, if it can be so called, in either view of the facts, was a mere expectancy, contingent, firstly, on his mother surviving Mahasundar, and, secondly, on his surviving his mother. His association in the deed of sale

1. (1878) 12 Ben. L. R. 483 (P. C.)

P. C.

Choudhri Gur Narayan v. Sheo Lal Singh.

Mr. Ameer Ali.

was, in their Lordships' opinion, wholly futile and had no legal effect in validating the transaction if otherwise invalid.

The High Court have rested their judgment on the question of estoppel on the provisions of S. 115 of the Indian Evidence Act (I of 1872), which provides as follows :—

"When one person has, by his declaration, act, or omission, intentionally caused or permitted another person to believe a thing to be true, and to act upon such behalf neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative to deny the truth of that thing."

There is absolutely no evidence that the vendee was induced to alter his position in any respect in consequence of Hanuman's representation contained in the deed of conveyance. The Subordinate Judge in his able judgment has given abundant reasons for holding that in the whole transaction Hanuman must have been a mere passive instrument in the hands of his elders, and that his so-called statement could not have materially influenced either the vendor's or the vendee's conduct in the matter.

As regards the theory that Hanuman's subsequent purchase of the property in 1895 from the reversioners should accrue to the benefit of the purchaser from Mahasundar, it is based on the assumption that what happened in 1880 created an estoppel against Hanuman. In their Lordships' opinion there is no estoppel. Besides, it should be observed that Hanuman did not acquire the property as a contingent reversioner to Mahasundar. The title on which the plaintiff's have brought their suit is based on an independent purchase by Hanuman from the rightful heirs.

Their Lordships are of opinion that the view of the learned Judges on the question of estoppel cannot be sustained.

Suit 101 relates to three properties called respectively Thali Khurd, Budhwara, and Korianna, which were sold by Mahasundar in 1854 for alleged legal necessities to the predecessors of the present defendants. The sale-deed is not forthcoming, and some evidence has been given of its loss which the High Court have accepted, and their Lordships are not prepared to dissent from their decision that the defendants had proved the sale of 1854. Their Lordships further agree with the learned Judges that legal necessity to the extent found by them has been established.

P. C.

Choudhri Gur Narayan v. Sheo Lal Singh.

Mr. Ameer Ali.

In the result, therefore, their Lordships are of opinion that in suit 99 of 1906 (Appeal 2 of 1911) the decree of the High Court should be reversed and that of the Subordinate Judge restored; and that in suit 101 of 1906 (Appeal 3 of 1911) the decree of the High Court should be varied by the inclusion of the name of Mohesh Lal, and that the decree should be in favour of the three plaintiffs (including Mohesh Lal) to the full extent of the properties claimed, subject to the payment by the plaintiffs to the defendants of Rupees 7,500 under the terms and conditions set forth in the decree of the High Court.

The appellants are entitled to their costs of this appeal, and of the appeal to the High Court in suit 99. In the appeal to the High Court arising out of suit 101, they will get their costs as decreed by that Court.

And their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants :—*T. L. Wilson & Co.*

Solicitors for respondents :—*Barrow Rogers and Nevill.*

A. P. P.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.
[FULL BENCH.]

PRESENT :—SIR JOHN WALLIS, CHIEF JUSTICE, MR. JUSTICE AYLING AND MR JUSTICE SESHAGIRI AIYAR.

Valan Pakkiri Taragan and others... *Appellants**. (*Defendants No. 1 to 3 and 6.*)

v.

Subbayan Samban and others ... *Respondents.* (*Plaintiffs Nos. 1 to 7, defendants Nos. 5, 7 to 10, 13, 14 and 16 and legal representatives of plaintiffs Nos. 8 and 9, and of defendants Nos. 12 and 15.*)

F. B.

Valan Pakkiri Taragan v. Subbayan Samban.

Highway—Right to use for processions—Criminal Procedure Code, S. 144—Order under, prohibiting user of the highway by a person or body of persons—No proof of special damage—Right to sue for a declaration of right and for an injunction against persons threatening obstruction.

* S. A. No. 370 of 1917. 14th November, 1918

F. B.

Valan Pakkiri Taragan v. Subbayan Samban.

An order of a Magistrate under S. 144 of the Criminal Procedure Code forbidding a person or body of persons from using a highway for the purpose of procession, invests the person or persons interdicted with a cause of action if they allege it to be an infringement of their legal rights, though such order be in itself *intra vires* and no special damage be alleged or proved.

It is competent to a person or body of persons who claim a right to go in procession along a public highway to bring a declaratory suit to establish that right against a person who threatens to obstruct it without allegation or proof of special damage.

Cases on the subject discussed.

Second Appeal against the decree of the District Court of Tinnevelly in Appeal Suit No. 390 of 1915 preferred against the decree of the court of the District Munsif of Tinnevelly in Original Suit No. 280 of 1912.

The Court (Ayling and Coutts Trotter, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH :—

This is a suit by the representatives of the Pariahs of Kottikulam locally known as Sambanmars against the defendants who are representative Muhammadans of the same place for a declaration that they are entitled to conduct processions along a certain public road in Kottikulam. As is usual in such cases, the existence of these processions has given rise to high feeling and is likely to lead to, rioting and bloodshed unless the rights of the parties are settled by the civil court. In March 1911 an application was made to the 2nd Class Magistrate of Palamcottah on behalf of the Pariahs for an order under S. 144 of the Criminal Procedure Code to restrain the Muhammadans from interfering with their procession. On that application the Sub-Magistrate made an order restraning the petitioners from going in procession along the path in question in this suit. It is true that he called it a warning, but we think it is clear that he meant to give a definite order and are prepared to treat Exhibit A as amounting to such. In November 1911 a further application was made to the Sub-Divisional Magistrate of Tinnevelly for a fresh order. He came to the conclusion that a breach of the peace was not imminent and therefore refused to pass orders either under S. 144 or S. 147 and he concluded by saying this: " If the Pariahs feel aggrieved by the Muhammadans objecting to their right of taking processions through a public street wherever Muhammadans live they should resort to a proper civil court for redress". Thereupon he dismissed the petition. No doubt in consequence of this the present suit was instituted in July 1912.

The objection taken by the defendants is that in the absence of proof of special damage no action will lie to enforce rights relating to a

F. B.

Valan Pakkiri Taragan v. Subbayan Samban.

public highway. The case-law on the subject is complicated and difficult, and we think that an effort should be made to establish definitely for this court at least, what the legal position really is.

The leading case in India in which the doctrine of English law was applied to this country was *Satku Valad Kadir Sausare* v. *Ibrahim Aga Valad Mirza Aga* [1] where the Chief Justice, Sir Michael Westropp, in a very learned judgment applied the rule of English law in its entirety to India, the rule being that a private person cannot bring a suit for interference with a right which he enjoys merely as a member of the public unless he has individually suffered damage, which means in this connection pecuniary damage. The reason for the rule in England was that the true remedy was one by indictment, and we are unaware of any corresponding remedy under the Indian law. Notwithstanding this the courts of India have adopted this view as for instance in *Baroda Prasad Mostafi* v. *Gora Chand Mostafi* [2], *Raj Luckhee Debia* v. *Chunder Kant Chowdhry* [3], and the doctrine was explicitly recognized in this court in *Hussain Sahib* v. *Narasimhappa* [4]. At the same time another doctrine gradually evolved itself in the courts, at any rate of this Presidency, which amounts in general terms to this: that in certain circumstances an order of a Magistrate prohibiting a procession under the provisions of the Criminal Procedure Code of itself gives a cause of action to the interdicted party. In our opinion the cases as to what those circumstances are, are neither clear nor consonant. In *Muthialu Chetti* v. *Bapun Saib* [5] the order of the Magistrate was held to be *ultra vires* and to create a cause of action in those against whom it was directed against those who had procured it. In *Muthayya* v. *Sudalaimuthu* [6] the magisterial order was held to constitute a cause of action, but it is not clear whether the learned Judges regarded the order as *ultra vires* or not. In *Kandasami Mudali* v. *Subroya Mudali* [7] the head-note is to the effect that where an "*illegal*" order of the Magistrate has been procured restraining a procession, a suit to declare the right to carry such procession is sustainable without proof of special damage. It does not appear from the report in that case that the order of the Magistrate was illegal in the sense of being one that he had not jurisdiction to make. It must be remembered that in making orders of this nature under the Criminal Procedure Code the Magistrate is expressly debarred from determining the civil rights of the parties, and is as expressly empowered in the interests of public order

1. (1875) I. L. R. 2 Bom 457.
2. (1869) 3 Beng. L. R. 295.
3. (1870) 14 W. R. 173.
4. (1912) 23 M. L. J. 589.
5. (1880) I. L. R. 2 Mad. 140.
6. (1909) 20 M. L. J. 119.
7. (1909) I L R. 32 Mad. 478.

F. B.

Valan Pakkiri Taragan v. Subbayan Samban.

to restrain members of the public from exercising rights which they may indubitably possess. But it is quite true that in the judgment the following sentence occurs: "The real distinction appears to be as pointed out in *Kazi Sujaudin* v. *Madhavdas* [1], that in the one case the cause of action is the alleged obstruction and in the other the improper order issued by a Magistrate at the instance of the defendants". The term 'improper' is obviously taken bodily from the judgment of Fulton, J., in *Kazi Sujaudin* v. *Madhavdas* [1]. It is capable of two constructions. It may mean an order which the Magistrate had no power to make, or it may mean an order which though within the jurisdiction of the Magistrate was in fact a derogation from the legal rights of the person or persons against whom it was made. In *Andi Moopan* v. *Muthuveera Reddy* [2], a Bench of this court appears clearly to have taken the view, though it was perhaps not necessary to the actual decision, that an order of itself *intra vires* on the part of the Magistrate would give rise to an action if in fact it fettered the plaintiffs in the action in the exercise of their legal rights. On the other hand, another Bench of this court in *W. Kalmatappa* v. *Joish Narayana Bhat* [3], unreservedly adopted the view that the order of the Magistrate to give rise of itself in a cause of action must be an order outside his competence and illegal. It is obvious that to restrict the cause of action to cases where the Magistrate's order is illegal will necessarily lead to an 'impasse' in which the claim of the parties will tend to be settled not by the determination of a court of law but by violence and bloodshed. We therefore think that the whole question had better be referred to a Full Bench

An entirely different set of considerations is evoked by the decision in *Baslingappa Pareppa* v. *Dharmappa Basappa* [4]. The report is meagre and the grounds of decision are not very clear; but the result is indubitably this: that the Bombay High Court held in that case that though an action for the abatement of a public nuisance would not lie without proof of special damage, a suit for a declaration of the right to pass in procession along a public highway would. We regard this decision as salutary and convenient, but we doubt whether considering the trend of authority in the courts of India, and above all in this court, we are at liberty to follow it. We think it best to refer this matter also to the decision of a Full Bench.

The questions we refer are therefore as follows:—

(1) When a Magistrate has made an order under the Criminal Procedure Code forbidding a person or body of persons from using a

1. (1893) I. L. R. 18 Bom. 693.
2. (1915) 29 M. L. J 91.
3. (1917) 42 I. C. 387.
4. (1910) I. L. R. 34 Bom 571.

F. B.

Valan Pakkiri Taragan v. Subbayan Samban.

highway for the purpose of processions, does such an order invest the person or persons interdicted with a cause of action if they allege it to be an infringement of their legal rights, though such order be in itself *intra vires* and no special damage be alleged or proved;

(2) Can a person or body of persons who claim a right to go in procession along a public highway bring a declaratory suit to establish that right against a person who threatens to obstruct it without allegation or proof of special damage.

T. R. Ramachandra Iyer with *T. R. Krishnasami Iyer* and *N. A. Krishna Iyer* for appellants :—

Under the English law a private person cannot bring a suit for interference with a right which he enjoys merely as a member of the public unless he has individually suffered damage. This is also the law in India. *Satku* v. *Ibrahim* [1], *Adamson* v. *Arumugam* [2], *Siddeswara* v. *Krishna* [3], and *Hussain Sahib* v. *Narasimhappa* [4]. S. 91 of the new C. P. Code (1908) also recognises this principle by requiring the sanction of the Advocate General where there is no special damage. There is no proof of special damage. The right to go in procession is a right which plaintiffs have in common with the other members of the public. *Sundaram Chetty* v. *The Queen* [5]. The order of the Magistrate is a proper and valid order.

(*Chief Justice.*—It is immaterial if the order is *intra vires* or not. That is not a sound test.]

The order, good or bad, is that of the Magistrate. The Magistrate can act under S. 144 of the Criminal Procedure Code on his own initiative. There is no cause of action against defendants.

[*Chief Justice.*—S. 42 of the Specific Relief Act might cover this case. The road is property to which plaintiffs have a right.]

S. 42 contemplates a private right. The decided cases are uniform that an order under S. 144, Criminal Procedure Code, if *intra vires* does not give a cause of action. The case of an order under S. 145 or S. 147 of the Criminal Procedure Code is different because at the expiry of 3 years from the date of the order, the person adversely affected would lose his right to the land or easement as the case may be, if he did not sue within that period.

Reference was made to 16 Halbury S. 269 ; *Muthialu Chetty* v. *Bapun Sahib* [6], *Kooni Meera Sahib* v. *Mahomed Meera Sahib* [7],

1. (1876) I. L. R. 2 B. 457.
2. (1886) I. L. R. 9 M. 463.
3. (1890) I. L. R. 14 M. 177.
4. (1912) 23 M. L. J. 589.
5. (1833) I. L. R. 6 M. 203, 218.
6. (1880) I. L. R. 2 M. 140.
7. (1906) I. L. R. 30 M. 15, 17.

F. B.

Valan Pakkiri Taragan v. Subbayan Samban.

Sadagopachariar v. *Krishnamoorthy Rao* [1], *Kandasami Mudali* v. *Subroya Mudali* [2], *Andi Moopan* v. *Muthuveera Reddi* [3], *Muthayya* v. *Sudalaimuthu* [4], *Baslingappa* v. *Dharmappa* [5], *Kalmatappah* v. *Joish Narayan Bhatt* [6], *Dundappa* v. *Secretary of State* [7], *Subbayya Nadan* v. *Aiyavoo Reddi* [8]. *Virupaxappa* v. *Sherif Saib* [9], says that there is no right of action in the absence of special damage, even where the statute recognises a right to sue on a police order being passed.

M. D. Devadoss very briefly replied and referred to. 1903 1 Ch. 109.

The Court expressed the following

Wallis, C. J.

Opinion :—*Wallis, C. J.*—In *Satku Valadkadir Sausare* v. *Ibraim Aga Vala l Mirza Aga,* [10] the facts are not set out in the report, and all that appears is that the plaint averred obstruction of the plaintiffs in their use of the highway by the defendants, and also an order of the Magistrate under S. 518 (now S. 144) of the Code of Criminal Procedure prohibiting the plaintiffs from using the highway in the particular way to which the defendants took objection. Sir Michael Westropp, C. J., after reviewing the English decisions as to the right of an individual member of the public to maintain an action for the obstruction of a public thoroughfare and showing that no such action would lie without proof of special damage, dismissed the plaintiffs' suit on that ground. The obstruction in the English cases cited consisted of interference with the surface of the highway which interfered with the right of the public to pass and repass freely. The same principle would, no doubt, apply if the defendants obstructed the public by assembling on the highway for their own purposes, as for the purpose of holding a market. That also would be a public nuisance and the rule as to special damage would apply. If, however, the defendants assembled to prevent the plaintiffs from exercising their lawful right to pass along the highway in a particular manner, that would appear not to be a case of public nuisance but of trespass or threatened trespass to the plaintiffs, and in trespass an action lies without proof of special damage. That, indeed, is the general rule,

1. (1907) I. L. R. 30 M. 189 (P. C.) on appeal from (1902) I L.R. 26 M. 376.
2. (1909) I. L. R. 32 M. 478.
3. (1915) 29 M. L. J. 91.
4. (1909) 20 M. L. J. 119.
5. (1910) I. L. R. 34. B. 571.
6. (1917) 42 I. C. 337.
7. (1916) 37 I. C. 363.
8. (1917) M. W. N. 70.
9. (1909) 11 Bom. L. R. 372.
10. (1877) I. L. R. 2 B. 457.

F.B.

Valan Pakkiri Taragan v. Subbayan Samban.

Wallis, C. J.

the rule as to special damage in cases of public nuisance being the exception. The Bombay High Court has recently taken this view in *Basalingappa Pareppa* v. *Dharmappa Basappa* [1], and has refused to apply the decision in *Satku Valad Kadir Sausare* v. *Ibrahim Aga Valad Mirza Aga* [2], a case like this. In that case the plaintiffs sued to establish their right to go in procession with a temple car along a particular road which was denied by the defendants. The lower Appellate Court thought that the plaintiffs had the right they claimed, but dismissed their suit as no special damage was shown, following *Satku Valad. Kadir Sausare* v. *Ibrahim Aga Valad Mirza Aga* [2]. The High Court reversed the decrees of the lower Courts and gave the plaintiffs a declaration and an injunction, observing, in the course of their judgment, that the suit was not for the removal of a public nuisance, but for a declaration of the right of an individual community to use the public road, a suit which they held to lie without proof of special damage. This case in my opinion was rightly decided and should be followed.

The case is stronger both on principle and authority where, in addition to the plaintiff's right to use the road in a particular manner being challenged by the defendants, the plaintiffs have been prohibited from exercising it under S. 144, Criminal Procedure Code. In deciding in a case like this how to exercise the power given him by the section to direct any person to abstain from a certain act "if he considers that such direction is likely to prevent or tends to prevent obstruction, annoyance or injury or risk of obstruction, annoyance or injury or a disturbance of the public tranquillity or a riot or an affray" the Magistrate must be governed largely, though not exclusively, by the opinion he forms as to the legal rights of the contending parties. He is not the proper Judge of these rights, and all that he can do is summarily and on materials which are necessarily imperfect, to form an opinion that one side or the other has made out a *prima facie* case of right and to give due weight to that opinion in deciding what order to pass. The effect, however, of the order which the Magistrate is empowered to pass by the section in the general interest is that for two months it becomes a punishable offence for the party to do an act which he may be in a position to establish his right to do before a competent

1. (1910) I. L. R. 34 Bom. 571.
2. (1877) I. L. R. 2 Bom. 457.

F. B.

Valan Pakkiri Taragan v. Subbiyan Samban.

Wallis, C. J.

tribunal. Further, the order may be extended by the Government, and, even if not extended, must necessarily form a precedent for the passing of a similar order whenever the circumstances recur.

In these circumstances, even if there were any rule of law prohibiting persons from establishing by suit their rights to use the road in a particular manner against those who challenge it unless they could show special damage, and in my opinion there is no such rule, I should still hold that the statutory interference under the order with the legal rights of the party without any adjudication upon them would of itself give him a cause of action in a Civil Court for the establishment of his right so as to prevent the order being continued by Government or renewed on a future occasion owing to a misapprehension of his rights if not so established. This would appear to be the result arrived in the recent decisions of the Court which are referred to in the order of reference, except in *W. Kalmatappa* v. *Joish Narayana Bhat* [1], which should be overruled, and also in *Mannada Mudali* v. *Nallaya Goundan* [2]. In the earlier cases which are referred to in the order, the Court seems to have been hampered by the decision in *Satku Valad Kadir Sausare* v. *Ibrahim Aga Valad Mirza Aga* [3] and to have avoided the difficulty by holding that in the particular case the illegal or improper order of the Magistrate constituted the cause of action. In some of the cases it is not easy to see wherein the illegality or impropriety consisted, and this consideration has been rightly discarded in later cases such as in *Mannada Mudali* v. *Nallaya Goundan* [2] which should, I think, be followed.

I would answer both questions in the affirmative.

Ayling, J.

Ayling, J.:—I agree that both questions should be answered in the affirmative.

As stated in the order of reference, I regard the decision in *Baslingappa Parappa* v. *Dharmappa Basappa* [4] as salutory and convenient; and was only deterred from following it by the rulings of Divisional Benches of this Court (*e.g.*, in *Kandasami Mudali* v. *Subroya Mudali* [5] in which the decision in *Satku*

1. (1917) 42. I. C. 337.
2. (1909) I. L. R 32 Mad. 527.
3. (1877) I. L. R. 2 Bom. 457
4. (1910) I. L. R. 34 Bom. 571.
5. (1909) I. L. R. 32 Mad. 478.

F. B.

Valan Pakkiri Taragan v. Subbayan Samban.

Ayling, J.

Valad Kadir Sausare v. *Ibrahim Aga Valad Mirza Aya* [1] had been treated as barring suits to declare a right of way where no special damage or special cause of action was proved. Now that the matter has been referred to a Full Bench, I have no hesitation in adhering to the view taken in the later Bombay case.

The first question is really unnecessary if the second be answered as above ; but I would only add that I fail to see why when a magisterial order purporting to be passed under S. 144 Criminal Procedure Code is alleged as the cause of action, it should make any difference whether the said order is *intra vires* or *ultra vires* of the Magistrate, who passed it. Its legality as distinguished from its expediency will ordinarily depend on considerations entirely dissociated from the civil rights of the parties affected. If it is held that an illegal order which may be disobeyed with impunity gives a right of action, all the more should a legal order, which cannot be contravened without a breach of the criminal law. If a legal order gives no cause of action, then the person injuriously affected will in most cases be without a legal remedy : for he could only secure special damage by disobeying the order and committing a criminal offence.

Seshagiri Aiyar, J.

Seshagiri Aiyar, J.—I am of the same opinion. I am satisfied after listening to the very full arguments of Mr. Ramachandrier that there should be no distinction between orders *intra vires* and *ultra vires* the magistrate with reference to a right of suit. It is practically offering a premium to break the law, if it is held that a party is not entitled to have recourse to a civil suit to establish his right after an adverse order against him by the Magistrate. I fail to see why the mistake of a Magistrate in clutching at jurisdiction or in passing an order which the law does not permit him to pass should place the party against whom it is made in a more advantageous position as regards civil remedy than the party against whom a Magistrate has acted within his powers, and has exercised his functions within the limits of law. In either case the party seeks the assistance of the Court on the ground that the order is wrong and deprives him of his rights ; consequently, there can be no justification for the artificial distinction between illegal and legal orders.

1. (1877) I. L. R. 2 Bom. 457.

F. B.

Valan Pakkiri Taragan v. Subbian Samban.

Seshagiri Aiyar, J.

The earlier cases which laid down that for an injury which is common to himself and to the rest of the public, the complaining plaintiff should allege special damage, proceeded on the ground that otherwise there would be multiplicity of suits. That seems to have been the basis of the English decisions on the point. But in England, there is apparently no procedure by which the Magistracy can prohibit particular classes, communities or bodies of persons from exercising civil rights. In my opinion, magisterial orders cause special injury to the persons prevented. Therefore the rule of English law is not strictly applicable in India. If I am right in this view, it would lead to no good to classify such orders into proper and improper ones and to invest the latter alone with the attributes of special injury. In both cases, the party is equally affected. In both cases, it is desirable that the party should have an opportunity of proving that his rights have been interfered with.

I am of opinion that *Mannada Mudali* v. *Nallaya Goundan* [1], *Muthayya* v. *Sudalaimuthu* [2], and *Andi Moopan* v. *Muthuveera Reddy* [3], lay down the law correctly. In the Bombay High Court there are a number of cases which hold that an order issued by the Police would not furnish a cause of action, but that special damage should be proved. *Virupakshappa* v. *Sherif Saib* [4] and *Dundappa Mullappa Sigandhi* v. *Secretary of State* [5]. They are inconsistent with *Baslingappa Parappa* v. *Dharmappa Basappa* [6]. Although this latter decision is based on a dictum in *Sadagopachariar* v. *Rama Rao* [7] which is not to be found in it, the conclusion is that special injury need not be proved when a portion of the public sues to establish a right of procession through a public highway. In my opinion this view is right. The dicta in *Muthialu Chetti* v. *Bapun Sahib* [8], *Kandasami Mudali* v. *Subroya Mudali* [9] and *Kalmatappa* v. *Joish Narayana Bhat* [10] that unless the order of the Magistrate is *ultra vires*, special damage should be proved must be overruled.

My answer to both the questions is in the affirmative.

A. V. V.

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1. (1909) I. L. R. 32 Mad. 527.
2. (1910) 20 M. L. J. 119.
3. (1915) 29 M. L J. 91.
4. (1909) 11 Bom. L. R. 372.
5. (1916) 37 I. C 363.
6. (1910) I. L. 34 Bom 571.
7. (1902) I. L. R. 26 Mad 376.
8. (1880) I. L. R. 2 Mad. 140.
9. (1909) I. L. R. 32 Mad. 478.
10. (1917) 42 I. C. 337.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR JOHN WALLIS, CHIEF JUSTICE AND MR. JUSTICE SESHAGIRI AIYAR.

P. Bhashyakarlu Naidu ... *Petitioner.* * (*Defendant.*)

v.

Nungambakkam Andalammal ... *Respondent.* (*Plaintiff*).

Bhashyakarlu Naidu v. Andalammal.

Specific Performance—Suit for specific performance of a contract to pay money—Whether lies—Suit for specific performance by the vendor of land against vendee—Whether a Court of Small Causes has jurisdiction over.

Ordinarily, a suit will not lie for specific performance of a contract to pay money. But the case of a vendor is an exception to that rule and the court will grant the vendor specific performance of the contract against the purchaser.

The nature of the averments and the form of the decree in such a case pointed out.

It would none the less be a suit for specific performance and not a suit for money as damages, if the contract between the parties stipulated for payment by the vendee first and execution of the conveyance by the vendor afterwards.

Although in a suit the prayer only asks for the payment of money, if taking the plaint averments as a whole the suit is one by the vendor of land for specific performance, a Court of Small Causes will have no jurisdiction to entertain it.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the judgment and order of the Court of Small Causes in Full Bench application No. 77 of 1917 in Suit No. 3295 of 1917.

K. S. Jayarama Aiyar, for Petitioner.

O. P. Venkataraghava Chari, for Respondents.

The Court delivered the following

Wallis, C. J.

Judgments :—*Chief Justice* :—This is an application to revise a decision of the Full Bench of the Court of Small Causes, Madras, which came before me yesterday and was referred to a Bench. It raises the question whether the plaint discloses a suit for specific performance of a contract to sell land. If it does, then admittedly the Court of Small Causes had no jurisdiction. Ordinarily of course, a suit will not lie for specific performance of a contract to pay money. But the case of the vendor, as pointed out in Fry's Specific Performance, page 33, is an exception to that rule, and the Court will grant the vendor specific performance of his contract against the purchaser ; and the form of the decree in such a case will be found in *Morgan v. Briscoe* [1] and is set out in Seton's Judgments

* C. R. P. No. 2 of 1918. 24th September, 1918.

1. (1886) 31 Ch. D. 216.

Bhashyakarlu Naidu v. Andalammal.

Wallis, C. J.

and Orders, Volume III pages 2174 and 2175. The form is that the plaintiff is to be at liberty to prepare and execute a conveyance to the defendant as an escrow to be delivered to the defendant on payment of the purchase money within the time limited, and that the defendant is to pay the purchase money after the conveyance is ready. It was stated that there was a difficulty about this in India, as under the Stamp Act the money for the purchase of stamp has to be found by the vendee. But this presents no real difficulty, as the duty may be paid by the vendor and added to the purchase money which the vendee has to pay under the decree.

That being so, we have to look at this plaint and see whether it is framed so as to disclose a suit for specific performance. In the passage cited to us in Halsbury's Laws of England, Vol. 27 page 83, it is stated that the vendor in a suit for specific performance must declare that he is ready and willing to execute a conveyance. In paragraph 3 of the plaint, the plaintiff recites a contract by which the defendant bound himself to pay the sum therein mentioned as soon as the High Court of Madras reopened after the summer vacation in July 1914, the plaintiff on her part undertaking to re-convey the said properties to this defendant by executing a conveyance in his favour and getting it registered. Paragraph 5 of the plaint says that the plaintiff avers that she is even now ready and willing to perform her part of the contract. Although the prayer only asks for the payment of Rs. 301-13-0, taking the plaint as a whole with the averment that the plaintiff is ready and willing to perform her part of the contract, I think it must be taken as a prayer for specific performance. That is sufficient to dispose of the present case.

The question has been argued before us, whether, supposing the contract between the parties stipulated for payment by the vendee first and execution of the conveyance by the vendor afterwards, that would make any difference. I am disposed to think it would not, and that the plaint would still be for specific performance of the contract, and the proper decree in such a case would be a direction that the defendant should pay followed by a direction in the decree that the conveyance should be executed after payment. The distinction, it seems to me, is whether the suit is to be regarded as a suit for money payable under the contract, in which case it is strictly a suit for specific

Bhashyakarlu Naidu v. Andalammal.

performance, or as a suit for damages. As I read the plaint, I think it is clear that the plaintiff has prayed for specific performance and therefore the petition must be allowed, and the decree of the Small Cause Court set aside, and the plaint returned for presentation to the proper court. Costs to abide.

Seshagiri Aiyar, J.

Seshagiri Aiyar, J:—I agree. The law as stated in Fry's Specific Performance at page 34, is, "It is well established that the remedy is mutual, and that the vendor may bring his action in all cases where the purchaser could sue for specific performance of the contract." The question in this case is whether the plaint is substantially one for specific performance. If there were no contract between the parties and if their relations were regulated by S. 55 of the Transfer of Property Act, there can be no doubt that the plaintiff will not be entitled to any money, and the suit will be regarded as premature, if there was no offer for executing a conveyance. It was suggested that under the terms of the contract there was a right to get money prior to the execution of the document and that the liability to execute the conveyance was to follow sometime after. I have asked the translator to translate the document once again, and I am satisfied that the right to the money and the right to the conveyance are practically contemporaneous. The word *thodane* suggests that the execution of the conveyance is to follow immediately on the payment of the money, and therefore this was a case of a mutual and dependent contract. The right to the money would not accrue unless the other party is ready and willing to execute a conveyance. In that view of the document, it seems to me that we must put a reasonable construction of the plaint in this case. If it is to be regarded not as a suit for specific performance, the suit is liable to be dismissed on the ground that there is no present right to the money. We have also to see whether the averments in the plaint are such as to enable us to regard the suit as one for specific performance. As my Lord has pointed out, there is an offer to execute a conveyance, and the document also says that other conveyances in respect of other portions of the property have already been executed. Therefore it seems to me that what the plaintiff wanted was that he should get his money on his executing a conveyance. That, as pointed out by the learned Chief Justice,

Bhashyakarlu Naidu v. Andalammal.

is really a suit for specific performance, and as such the Small Cause Court has no jurisdiction. I entirely agree with the order as regards the return of the plaint to the proper court.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE KUMARASWAMI SASTRI.

Anantha Bhatta ... *Appellant* (Plaintiff)).*

v.

Manimmale Anantha Bhatta and others ... *Respondents (Defendants* 1, 3 *to* 6, 2, 7 *&* 8).

Anantha Bhatta v. Anantha Bhatta.

Mulgeni tenant—Right to improvements—Whether can be attached in execution of a decree and sold.

The right to improvements of a mulgeni tenant in South Canara may never mature, as the lease is a permanent one; consequently such a right cannot be attached and sold in execution of a decree against the tenant.

Second appeal against the decree of the Court of the Subordinate Judge of South Canara in A S No. 88 of 1916 (A. S. No. 12 of 1916 on the file of the District Court) preferred against the decree of the Court of the District Munsif of Karkal in O. S. No. 134 of 1915.

H. Balakrishna Row and *Ramanath Sujir* for Appellant.

B. Sitarama Row, for Respondents.

The Court delivered the following

Judgment :—The question is whether the right to improvements of a mulgeni tenant can be attached and sold in execution.

It is conceded that his rights are the same as the rights of a tenant in Malabar, and it has been held by this Court in *Achuta* v. *Kali* [1] and *Eressa Menon* v. *Shamu Pattar* [2] that a right to compensation for improvements is merely an inchoate right which only becomes perfected at eviction. It is a right to be enforced only at the time of eviction and the extent of the right is dependent on what may be the relations between the landlord and the tenant at that time and also on the number and nature of the improvements in existence then. In the present case the lease being permanent the right may never

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* S. A. No. 376 of 1917. 4th September, 1918.

1. (1884) I. L. R. 7 M. 454. 2. (1898) I. L. R. 21 M. 138.

mature. This being so we must hold that such a right cannot be attached.

Anantha Bhatta v Anantha Bhatta.

Whether individual improvements can be attached and sold is a question which does not arise in this case and need not be discussed.

The second appeal is dismissed with costs.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :— SIR JOHN WALLIS, CHIEF JUSTICE AND MR. JUSTICE KRISHNAN.

Ayya Krishnaswami Thathachariar ... *Appellants* * *Plaintiffs. (2 to 4,)*

v.

Veeraswami Mudali and others ... *Respondents, (Defendants 2, 4, 3 and 1st plaintiff.)*

Krishnaswami Thathachariar v. Veeraswami Mudali.

Limitation Act (Act IX of 1908), S. 2 (4), Art. 124—Suit for the recovery of a hereditary office of archaka—Defendant and his predecessors claiming to be appointed by the trustees of the temple—Defendant in possession of the office for less than 12 years—Possession by defendant and his predecessors for more than 12 years—Plaintiff's suit whether barred—Whether "defendant" includes predecessors

A suit by a hereditary archaka of a temple to recover his office is barred by limitation under article 124 of the Limitation Act where the plaintiff is out of possession of the office for more than 12 years and the defendant, the archaka in possession, and his predecessors claiming under a title by successive appointments by the trustees have been in possession all the time even though the defendant may have been in possession for less than 12 years.

The term "defendant" in the third column of article 124 includes the predecessors of the defendant though holding office under successive appointments.

Second appeal against the decree of the District Court at Chingleput in A. S. No. 253 of 1914 preferred against the decree of the court of the District Munsif at Conjeeveram in O. S. No. 227 of 1911.

T. Narasimha Aiyangar, and *N. S. Rangasami Aiyangar,* for Appellants.

Dr. S. Swaminathan for the Respondents.

The court delivered the following

Judgment :—In this second appeal, the question which arises is whether plaintiffs, who according to the finding were at one time hereditary archakas of the suit temple but had been out of possession and enjoyment of that office for about 60

* S. A. No 987 of 1917. 10th October, 1918.

Krishnaswami Thatha chariar v. Veeraswami Mudali.

years, were barred under art. 124 of the Limitation Act, when they brought this suit against the 5th defendant, the archaka in possession, and the 1st to 4th defendants, the trustees of the temple by whom this archaka and the preceding archakas for many years have been appointed. In the plaint the plaintiffs claimed to recover possession of the office of archaka from the 5th defendant, and they claimed an injunction restraining defendants 1 to 4, the trustees, from causing any obstruction to them or to any one else who performed the duties of archaka on their behalf.

Under article 124 of the Limitation Act, for possession of an hereditary office, time runs against the plaintiff from the time when the defendant takes possession of the office adversely to the plaintiff, and to preclude any difficulty as to what was meant by the possession of an hereditary office, the explanation says, "An hereditary office is possessed when the profits thereof are usually received, or (if there are no profits) when the duties thereof are usually performed". It is not denied that the 5th defendant in this case has taken possession of the office, but it is said that he took possession within 12 years, so that the suit is not barred, as against him. The question then arises whether under the definition of 'defendant' in S. 2, sub-section (4) of the Limitation Act which enacts that '*defendant*' includes 'any person from or through whom a defendant derives his liability to be sued', the present 5th defendant, must not be considered to derive his liability *from or through* his predecessors in the office, all of whom like himself for many years held the office of archaka by virtue of their appointment by the trustees of the temple. The trustees of the temple are the persons in whom the right to appoint archakas is vested, when that office is not hereditary. Now it has been held in *Raja of Palghat* v. *Raman Unni* [1], following other cases including *Pydigantum Jagannatha Row* v. *Rama Doss Patnaik* [2], that in the case of successive holders of a *stanom*, they claim from or through each other within the definition of a 'plaintiff' in the Limitation Act, and there are similar decisions about heads of mutts, and other persons in a similar position. We think that the same principle applies to the case. Here all these successive archakas had held office one after another, claiming under the same right, namely, appointment by the trustees of the temple.

1. (1916) 33 M. L. J. 26. 2. (1904) I. L. R. 28 M. 197.

In the case of *stânikas*, it is the peculiar rule of succession that confers their appointment upon them. In this case, the rule of law is that a trustee of a temple can appoint archakas where the office is not hereditary. There is no substantial distinction, it seems to us, between the two cases. Here all the archakas who have been in possession of their office now for nearly 60 years, have held their office by virtue of their appointment by the temple trustees. We think that the word 'defendant' in the 3rd column of art. 124 includes the 5th defendant's predecessors, and therefore as more than 12 years have elapsed since the defendant took possession, the suit is barred. As was pointed out by Subramania Aiyar, J. in *Pydigantam Jagannatha Row* v. *Rama Doss Patnaik* [1], any other ruling would go far to destroy the effect of the Limitation Act, because there would be no limit of time whatever unless the defendants were able to prove that some particular holder of the archaka office had been in possession for more than 12 years.

Krishna swami Thatha-chariar v. Veeraswami Mudali.

The 5th defendant did not appeal from the decree passed against him by the District Munsiff. But the District Judge held that the plaintiffs' suit was barred, and appears to have dismissed the suit against him also. In this, we think, he was quite right. It was necessary to give effect to the rights of the parties as established by the decree that the suit against him also should be dismissed, and the plaintiffs prevented from interfering in the affairs of the temple.

In the result, the second appeal is dismissed with costs.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE AYLING AND MR. JUSTICE KRISHNAN.

T. K. Parameswara Iyer, and others. *Petitioner* * (*Petitioners* 1 *to* 10, 12, 13, 16, 17 *and* 19).

v.

Land Acquisition Collector, Palghat and others. *Respondents. Land Acquisition Officer and Petitioners* 11, 14, 15, 18, 20, 21, 22 *and* 23).

Parameswara Iyer v. Land Acquisition Collector Palghat

Land Acquisition Act I of 1894—*Ss.* 18 (1); 3 (*b*)—"*Person interested*" *in S.* 18 (1)—*Meaning—Application for reference by person claiming interest in compensa-*

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* C. R. P. No. 853 of 1917. 22nd October, 1918.

1. (1904) I. L. R 28 M. 197.

Parameswara Iyer v. Acquisition Collector Palghat.

tion—Order rejecting, on ground of no interest—Nature of—Revision by High Court—Jurisdiction—C P. C.—S 115—Government of India Act—S 107—Applicability—Jurisdiction of Collector under S 18 of Land Acquisition Act

By virtue of S. 3 (b) of the Land Acquisition Act, the expression "any person interested" in S 18 (1) of the Act includes a person *claiming* an interest in the compensation. As long, therefore, as an application under S. 18 of the Act sets out a claim to an interest in the compensation, it is no part of the collector's duty to decide whether the claim is well-founded; and he is not authorised to refuse to make the reference merely because he may think it is not.

In rejecting an application under S 18 a collector acts judicially and his order, if illegal, is subject to revision by the High Court under S. 115 of C P. C. or S. 107 of the Government of India Act.

The Administrator General of Bengal v. *The Land Acquisition Collector*[1] followed.

Best and Co. v. *Deputy Collector of Madras.*[2] dissented from.

Petition under S. 115 of Act V of 1908, and S. 107 of the Government of India Act praying the High Court to revise the order of the Court of the Revenue Divisional Officer of Palghat and Land Acquisition Collector, dated 30th March 1917 in L. A. C. No. 1 of 1917.

C. V. Ananthakrishna Aiyar and *P. S. Narayanaswami Aiyar,* for Appellants.

The Government Pleader for Respondents.

The Court delivered the following

Ayling, J.

Judgments:—*Ayling, J*:—In this case we are asked to revise an order of the Revenue Divisional Officer of Palghat dismissing petitioners' application under S. 18 of the Land Acquisition Act (1 of 1894) for a reference to the Court regarding his award of compensation for certain lands of a devaswom acquired under the Act.

The order is very brief and runs thus :

"These persons do not appear to be the accredited representatives of the devaswom. The petition is therefore rejected."

That the order is illegal hardly admits of doubt. S. 18 enables "any person interested, who has not accepted the award" to "require" a reference: and S. 3 (*b*) defines "persons

1. (1905) 12 C. W. N. 241. 2. (1916) 20 M L. T 388.

Parameswara Iyer v. Land Acquisition Collector Palghat.

Ayling, J.

interested" as including all persons *claiming* an interest in the compensation. As long as the application sets out a claim to an interest in the compensation, it is no part of the Collector's duty to decide whether the claim is well founded: and he is not authorised to refuse to make the reference merely because he may think it is not. Petitioners in their application in the present case undoubtedly claim an interest in the compensation as trustees and managers of the devaswom to which the acquired property belongs: and they have not accepted the award.

It is, however, contended by the Government pleader that however illegal the Revenue Divisional Officer's order may be, it is not one with which we can interfere either under S. 115 of the Code of Civil Procedure, or S. 107 of the Government of India Act, because it is not the order of a "Court" Subordinate to this Court. He relies mainly on a recent decision of this Court in *Best and Co.* v. *Deputy Collector of Madras* [1] which undoubtedly supports him, although after careful and respectful consideration I am unable to agree with the view of the learned judges. The latter is not based on independent reasoning so far as the judgment discloses, but on two earlier cases, which do not appear to bear the interpretation put upon them: and it is certainly opposed to the weight of authority in other Courts. The cases referred to are *Ezra* v. *Secretary of State for India* [2] and *British India Steam Navigation Co.* v. *Secretary of State for India* [3]. An examination of them shows that both dealt with the power to revise the award of a Collector under S. 11 of the Act, and with the nature of the proceedings, which led up to, and terminated in, such an award. Their Lordships of the Privy Council in the first case say that the proceedings resulting in this award are administrative and not judicial; and the learned Judges of the Calcutta High Court in the second case take the matter practically no further. They in fact specifically reserve the question before us of whether the order of a Collector refusing to make a reference under S. 18 is subject to rivision by the High Court: while at the same time, they refer to a case *The Administrator General of Bengal* v. *The Land Acquisition Collector* [4] in which it was held to be revisable.

1. (1916) 20 M. L. T. 388.
2. (1905) I. L. R 32 Cal. 605.
3. (1910) I. L. R. 38 Cal. 230
4. (1905) 12 Cal. W. N. 241.

Parameswara Iyer v. Land Acquisition Collector, Palghat.

Ayling, J.

Neither case is therefore an authority for the proposition that it is not revisable.

On the other hand the case last quoted is clear authority for holding that there is a distinction between Part II and Part III of the Act, and that in rejecting an application under S. 18 a Collector acts judicially and his order is subject to revision by the High Court. Although Mookerjee and Sharfuddin, JJ. in *British Indian Steam Navigation Co. v. The Secretary of State for India* [1], left this point open, as not necessary for the decision of the case before them, the decision in *The Administrator General of Bengal v. The Land Acquisition Collector* [1] was followed by another Bench of that Court in *Krishna Das v. Collector of Patna* [2], as well as by a Bench of the Patna High Court in *Saraswati Pattack v. The Land Acquisition Deputy Collector of Champaran* [3].

I am moreover inclined to take the same view. The proceeding under Part III of the Land Acquisition Act are undoubtedly judicial in character, and although the part played in them by the Collector is small, he is far from being a mere post office or channel for transmission of the representations of the persons interested. He has to determine whether the application satisfies the conditions of the proviso to S. 18, and in making the reference he has to set out the grounds of his own award, and his opinion as to what persons are really interested in the land acquired. I think he may be considered to be acting as a "Court".

I may add that unless such an order is open to revision it is not clear what remedy a person aggrieved by it possesses. In *Best and Co. v. Deputy Collector, Madras* [4] the learned Judges were dealing with an application for a mandamus under S. 45 of the Specific Relief Act. The effect of proviso (d) to that Section is to exclude cases where the applicant has any other specific and adequate legal remedy : and it was in order to determine whether this proviso applied that the question of the admissibility of a revision petition had to be considered. It was even argued before us that for this reason the ruling was an *obiter dictum* ; but while this argument is unsound, the

1. (1910) I. L. R. 38 Cal. 230.
2. (1911) 16 Cal. L. J. 165.
3. (1917) 2 Patna L.J. 204.
4. (1916) 20 M. L. T. 388.

Parameswara Iyer v. Land Acquisition Collector, Palghat

Ayling, J.

circumstances under which the point arose may perhaps be looked to. However that may be, the remedy by way of "Mandamus" is only available within the original civil jurisdiction of this Court: and I feel very doubtful how far the alternative reliefs suggested by the Government pleader (a suit for damages and a suit under S. 55 of the Specific Relief Act) are available to parties in the plight of the present petitioners. That some remedy should be at the disposal of parties aggrieved by an arbitrary order like the one before us is incontrovertible.

I am of opinion that the order is open to revision, and if so, it is certainly one which we should set aside. I would set aside the order of the Revenue Divisional Officer and direct him to make a reference to the District Court, as provided by law. Costs of this petition will be provided for in the District Judge's award.

Krishnan J

Krishnan, J. :—The main argument before us in this case has been on the question whether we have power under S. 115 of the Code of Civil Procedure or under S. 107 of the Government of India Act to revise the order of the Revenue Divisional Officer as the Land Acquisition Collector, refusing to refer to the Court under Ss. 18 and 19 of Act I of 1894, the application filed by the petitioners under S. 18.

The learned Government Pleader contended that in making his order the Divisional Officer was acting in his administrative capacity only and not as a Court Subordinate to the High Court and therefore his order, however illegal it might be, was not open to be revised by us under our revisional powers. He has relied on the ruling in *Best and Co.* v. *Deputy Collector of Madras* 1 in his favour. On the other hand the learned vakil for the petitioners has drawn our attention to the rulings in *The Administrator-General of Bengal* v. *The Land Acquisition Collector* 2 and *Saraswati Pattack* v. *The Land Acquisition Deputy Collector of Champaran* 3 where under similar circumstances the High Courts of Calcutta and of Patna held that they had power to interfere in revision and did so.

Though the question is not free from difficulty I am inclined to think that as between the two views above stated we

1 (1916) 20 M. L. T. 338. 2. (1907) 12 C. W. N. 241.
3. (1917) 2 P. L. J 204.

Parameswara Iyer v. Land Acquisition Collector, Palghat.

Krishnan, J.

should adopt the latter because it is consistent with the language and scheme of the act and because if we do not do so, there will be no proper and adequate remedy to prevent a misuse of power by the Land Acquisition Collector who, by adopting the simple expedient of refusing to refer, may prevent an enquiry by Court into the correctness of his own award; at any rate in all cases arising outside the Presidency towns. The remedy by Mandamus under S. 45 of the Specific Relief Act which was adopted in *Best and Co.* v. *Deputy Collector of Madras* [1] is available only within the Ordinary Original Civil Jurisdiction of the High Courts and not outside it. The learned Government Pleader suggested that on the principles laid down in *Luchmeswar Singh* v. *Chairman Darbhanga Municipality* [2], *Gaekwar Sarkar of Baroda* v. *Gandhi Kachrabhai* [3] and *Rameswar Singh* v. *Secretary of State for India* [4] the petitioners had a right to sue for damages; but even if this is so, about which I express no opinion, it is not an adequate or satisfactory remedy. It was also suggested by him that an action might lie under S. 55 of the Specific Relief Act to direct the Collector by a mandatory injunction to make the reference he refused to make. No authorities have been cited in support of this suggestion and it seems to be of doubtful validity. But whether the petitioners have another remedy or not I think we should interfere if we have the power to do so.

It seems to me that a careful consideration of the scheme and language of part III of the Act leads to the conclusion that the act of the Collector in refusing to make a reference under S. 19 is a judicial act. Now it cannot be denied that the proceedings under part III which result in an award of the Court are judicial proceedings and by virtue of S. 54 the Court is subordinate to the High Court. Ss. 18 and 19 provide for the procedure to be adopted to initiate those proceedings. Ordinarily a proceeding is commenced in a Court of Law by the presentation of a plaint or a petition to it; but the Land Acquisition Act has adopted a somewhat different method, *viz.*, the presentation of the application to the Collector. If the requirements of S. 18 are complied with the Collector has no

1. (1916) 20 M. L. T. 388.
2. (1890) I. L. R. 18 Cal. 99.
3. (1903) I. L. R. 27 Bom. 344.
4. (1907) I. L. R. 34 Cal. 470.

Parameswara Iyer v. Land Acquisition Collector, Palghat.

Krishna, J.

option but to make the reference; and in doing so, in addition to the statement to be sent by him under S. 19 cl. (1), he has to attach a schedule of the particulars of the notices served and of the statements made by the parties. The objection petition itself is forwarded to the Court. The limitation fixed under S. 18 has also reference to the filing of the objection petition. It seems clear therefore that the proceedings which culminate in the court's award commences with the filing of the application under S. 18. As soon as it is filed the matter of the amount of proper compensation assumes a litigious form and becomes a contentious proceeding between the owner and the Collector. It was held by Chandavarkar. J., in *In Re Land Aquisition Act—In Re Rustomji Jijibhai* [1] that the application under S. 18 is in the nature of a plaint in a suit. But whether it be a plaint or a petition I consider it to be the first step in the judicial proceedings and to be an integral part of it. It follows therefore that if the Collector decides to reject it or passes any orders regarding it he does so judicially and not administratively ; for a judicial proceeding once commenced cannot be affected by administrative action. The questions that the Collector may have to decide under S. 18, *viz.*, whether the applicant is a person interested within the meaning of the Act, whether the application is in proper form and whether it is in time are all questions that have to be decided judicially. If therefore the Collector takes upon himself to pass an order which has the effect of rejecting the petitioner's application and of preventing his claim being tried by the Court I see no difficulty in holding that it should be treated as a judicial order subject to our revisional jurisdiction.

The ruling in *Best and Co.* v. *Deputy Collector of Madras* [2] has no doubt taken the contrary view but with every respect to the learned Judges I regret I am unable to adopt it. The ruling in it on the point before us seems, as pointed out by my learned brother, to be based entirely on what appears to be a wrong impression of the scope of the rulings in *Ezra* v. *Secretary of State for India* [3] and *British India Steam Navigation Co.* v. *Secretary of State for India* [4] which the learned Judges purport to follow. Neither case dealt with a question

1. (1905) I. L. R. 30 B. 341.
2. (1917) 20 M. L. T. 338.
3. (1905) I. L. R. 32 Cal. 605.
4. (1910) I. L. R. 38 Cal. 230.

Parameswara Iyer v. Land Acquisition Collector, Palghat.

Krishnan, J.

such as the present one arising under part III of the Act. The observation of the Privy Council is not, as stated in *Best & Co.* v. *Deputy Collector of Madras* [1] that the proceedings of the Collector are administrative "until the matter comes before the Land Acquisition Judge," but only that they are administrative "till they result in his award." See *Ezra* v. *Secretary of State for India* [2].

In the second case above cited the question arose with reference to an application by the Secretary of State to direct the Collector to pass a fresh award under S. 11. It was with reference to that, that the learned Judges held, following *Ezra's case,* that they could not interfere in revision. When the case in *The Administrator General of Bengal* v. *The Land Acquisition Collector* [3] was cited to them they distinguished it on the ground that that case referred to a proceeding relating to the Collector's award. They did not dissent from that ruling; and it has since been followed by the same High Court in *Krishna Das Roy* v. *The Land Acquisition Collector of Pabna* [4] and as already stated the Patna High Court has adopted the same view.

It would also appear that the attention of the learned Judges in *Best and Co.* v. *Deputy Collector of Madras* [1], was not drawn to the distinction between the position of the Collector under part II of the Act and his position under part III. In the former he acts practically as an agent of the Government in fixing the price to be paid and in taking possession of the land which is acquired. His award is not binding on the owner as he can ask for a reference under S. 18; nor is the Government bound till possession is taken as it can under S. 48 withdraw from the acquisition till then. It was with reference to these circumstances that his action was held to be an administrative one by the Privy Council. That ruling however is not decisive of the Collector's position under part III where, as explained above he seems to act in a judicial capacity as part of the Court and receives the objection petition and deals with it.

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1. (1916) 20 M. L. T. 388.
2. (1905) I. L. R. 32 C. 605. at p. 629.
3. (1907) 12 C. W. N. 241.
4. (1911) 16 C. W. N. 327; 16 C. L. J. 165.

Parameswara Iyer v. Land Acquisition Collector, Palghat.

Krishnan, J.

I therefore agree with my learned brother that we should follow the view in *The Administrator-General of Bengal* v. *The Land Acquisition Collector* [1] in preference to that in *Best and Co.* v. *Deputy Collector of Madras* [2] and hold that we have power to interfere in revision with the order of the Sub-Divisional Officer.

On the merits there can be no question that his order is wrong. In fact if the Sub-Divisional Officer had looked at the definition of "person interested" in S. 3, clause (*b*) of the Act I think he would not have passed the order he passed. In rejecting the application on the ground stated by him, when he had no power to do so, he must be taken to have acted illegally in the exercise of his jurisdiction and we should therefore interfere under S. 115 of the Code of Civil Procedure. I agree to the order proposed by my learned brother.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR JOHN WALLIS, THE CHIEF JUSTICE, MR. JUSTICE SADASIVA AIYAR AND MR. JUSTICE SPENCER.

Kozhikot Kizhakka Kovilagath Sri Mahavedan *alias* Valia Kunhunni Rajah Avergal. *Appellant* * (*Appellant in A. S. No.* 18 *of* 1917. *On the file of the High Court—Defendant*).

v.

The Present Zamorin Rajah of Calicut represented by the Estate Collector *Respondent (2nd Plaintiff)*

Kozhikot Sri Manavedan v. Zamorin of Calicut.

Malabar Law—Stanom—Alienation by stani, when binding on successor.

The party who alleges that an alienation by a stani is valid beyond the life-time of the grantor, that is, that it is binding on his successor, ought to prove that the alienation was for the benefit of the estate or (to put it in a different way) was such as would be binding on the other members of a joint Hindu family if made by a manager of the family.

Appeal under Clause 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Oldfield in A. S. No. 18 of 1917, preferred against the decree of the court of the Temporary Subordinate Judge of Palghat at Calicut in O S. No. 45 of 1914.

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* L. P. A. No. 3 of 1918. 11th April, 1918.

1 (1907) 12 C. W. N. 241. 2. (1916) 20 M. L. T. 388.

Kozhikot Sri Manavedan v. Zamorin of Calicut.

C. V. Anantha Krishna Iyer and *K. P. Rama Krishna Iyer* for Appellant.

A. Sundaram for Respondent.

The Court delivered the following

Judgment :—The party who alleges that an alienation by a stani is valid beyond the life-time of the grantor, that is, that it is binding on his successor, ought to prove that the alienation was for the benefit of the estate or (to put it in a different way) was such as would be binding on the other members of a Joint Hindu family if made by a manager of the family (who was not also the father of the other members).

The defendant in this case did not take any steps to discharge the burden of proof and the disputed alienation was a lease for 72 years by an old gentleman almost on his death-bed in favour of a near relative. We therefore hold that the lower court rightly decided that the alienation was not binding on the successor of the grantor. The Letters Patent appeal must be dismissed with costs.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SESHAGIRI AIYAR AND MR. JUSTICE PHILLIPS.

Ramaswami Pillai ... *Appellant* * *(1st defendant).*

v.

Govindaswami Naicker... *Respondent (Plaintiff).*

Ramaswami Pillai v. Govindaswami Naicker.

Limitation Act, Ss. 9 *and* 15—*Suit upon promissory note executed by person subsequently adjudged insolvent—Limitation—No right to deduct time during which insolvency proceedings were pending.*

The defendant executed a promissory note in favour of the plaintiff's assignor in April 1910. In October 1910 defendant applied to be adjudged an insolvent and was so adjudged in December 1911. In July 1914 the adjudication was annulled because there was a composition with the creditors. The plaintiff brought a suit on the note in July 1915 claiming to deduct the time during which the insolvency proceedings were pending, under S. 15 of the Limitation Act.

Held, that the effect of the order of adjudication was not to stay all proceedings against the insolvent but merely to impose on the plaintiff the necessity of obtaining leave to sue from the Court under S. 16 (2) of the Provincial Insolvency Act and that the suit was barred by limitation.

Soni Ram v. *Kanhaya Lal* [1], *Dorasami Padayachi* v. *Vaithylinga Padayachi* [2] relied on.

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* S. A. No. 2225 of 1917. 4th November, 1918.

1. (1913) I. L. R. 35 A. 227=25 M. L. J. 181.
2. (1917) 33 M. L. J. 46.

Ramaswami Pillai. v. Govindaswami Naicker.

Second Appeal against the decree of the District Court of Tanjore in A. S. No. 19 of 1917 preferred against the decree of the Court of the Additional District Munsif of Kumbakonam in O. S. No. 160 of 1916.

C. A. Seshagiri Sastri for *K. Krishnaswami Aiyangar* for Appellant.

K. Bhashyam for *K. Narasimha Aiyangar* for Respondent.

The Court delivered the following

Judgment :—This second appeal can be disposed of on the short point of limitation. The bond and the pronote sued on were executed in February and April 1910. The suit was brought in July 1915. In October 1910 the 1st defendant applied to be adjudged an insolvent and was so adjudged in December 1911. In July 1914 that adjudication was annulled because there was a composition with the creditors. Apparently the present plaintiff received no dividends under the composition. He is the assignee of the bond and the pronote. The question is whether his present claim is barred by limitation. Mr. Bhashyam Aiyangar for the respondent, contended that S. 15 of the Limitation Act saved the bar. His argument was that the order of adjudication was tantamount to an order to stay all further proceedings in the matter. As we read S. 16, clause (2) of the Provincial Insolvency Act, what the order of adjudication effects is not an absolute stay, but a direction that before a suit is brought a condition precedent should be complied with, namely the obtaining of leave to sue from the Court. In our opinion, S. 15 of the Limitation Act does not operate to save limitation in cases where the suit could have been instituted on complying with the preliminary requisite in that behalf. The learned vakil relied on *Shunmugam* v. *Moideen* [1]. That case proceeded on the construction of the particular order before the Court. Moreover the authority of that decision is much shaken by the decision of the Judicial Committee in *Beti Maharani* v. *Collector of Etawah* [2]. As regards *In re General Rolling Stock Company* : *Joint Stock Discount Company's Claim* it is clear that what the Court of Appeal laid down was that so long as the matter is pending before the Bankruptcy Court, the liquidator can admit a claim to proof and the fact

1. (1884) I. L. R. 8 Mad. 229. 2. (1872) I. L. R. 17 All. 198.
3. (1894) 7 Ch. Appeals 646.

Ramaswami Pillai v. Govindaswami Naicker

that leave to prove the debt was given or refused does not affect the question. In *Unni Koya* v. *Umma* [1] this Court held on a construction of S. 273 of the Code of Civil Procedure that there was a total prohibition against persons other than the decree-holder from executing the decree. In that view S. 15 clearly applied.

Having regard to S. 9 of the Limitation Act and to the observation of the Judicial Committee in *Soni Ram* v. *Kanhaiya Lal* [2] we are unable to agree with the District Judge that S. 15 of the Limitation Act is applicable to this case. Vide also *Doraswami Padayachi* v. *Vaidylinga Padayachi* [3]. For these reasons we think that the suit was barred by limitation. We must therefore, reverse the decree of the District Judge and restore that of the District Munsif with costs here and in the Court below.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SADASIVA AIYAR AND MR. JUSTICE SPENCER.

Bachu Soorayya and another	...	*Appellants** (*Defendants 3 & 4.*)
v.		
Toomuloori Chinna Anjaneyalu, minor by his mother and next friend Mahalakshmamma and another.	...	*Respondents* (*Plaintiff and Defendants 1 and 2.*)

Bachu Soorayya v. Toomuloori Chinna Anjaneyalu.

Legal representative—Suit against a person in possession of the estate of the deceased-debtor, such person not being the real heir—Binding nature of the decree and execution proceedings on the real heir.

Where a decree is passed for a debt due by a deceased debtor in a suit brought against a person in possession, but who is not the heir, of the deceased debtor's estate the decree and the proceedings in execution of such decree bind the interest of the real heir ; such a case is an exception to the general rule that proceedings in execution of a decree do not bind the interest of any person who was never brought on the record as a party to the proceedings in the suit.

Gnanambal Ammal v. *Veeraswami Chetty* [4], explained.

Second Appeal against the decree of the Court of the Subordinate Judge of Cocanada in A. S. No. 73 of 1916,

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* S. A. No. 2118 of 1917 8th October, 1918.

1. (1911) I. L. R. 35 Mad. 622=21 M. L. J. 577.
2. (1913) I. L. R. 35 All. 227.
3. (1917) 33 M. L. J. 46.
4. (191.) 29 M. L. J. 698.

Bachu Soorayya v Toomuloarl China Anjaneyalu

preferred against the decree of the Court of the District Munsif of Cocanada in O. S. No. 294 of 1916.

A. Krishnaswami Aiyar for Appellants.

P. Narayanamurthi and M. Patanjali Sastri for Respondents.

The Court delivered the following

Sadasiva Aiyar, J.

Judgments :—*Sadasiva Aiyar, J.*—Defendants 3 and 4 are the appellants in this second appeal. The 4th defendant is the purchaser in court-auction sale of the plaint property which belonged to the plaintiff's father who died before 1913. The decree in execution of which the sale took place, was a Small Cause decree passed in a suit of 1913 brought against the plaintiff's father's brother as 2nd defendant, he being impleaded as the legal representative of the plaintiff's father Seethayya who was then dead. The 2nd defendant was divided from plaintiff's father and he was not the real legal representative of plaintiff's father, the minor plaintiff being such representative. The question is whether the court-auction sale is binding on the plaintiff.

In paragraph 6 of the plaint, it is alleged that the 2nd defendant was not only not the heir of the plaintiff's father, but that the plaint property was never in the possession of the 2nd defendant after the plaintiff's father's death. These allegations in the plaint were not expressly denied in the appellants' written statements. The learned Vakil for the appellants relied, among other decisions, on the decision of Napier, J. and myself in *Gnanambal Ammal* v. *Veerasami Chetty* [1]. There a decree had been passed against a person in possession of the property of the deceased debtor, though that person was not the heir of the debtor. We held that if the plaintiff in good faith obtained a decree against a person who was in possession of his debtor's property and whom the plaintiff believed to be the legal heir, execution proceedings taken in pursuance of that decree will bind the real heir. We held that the cases in *The General Manager of the Raj Durbhanga* v. *Maharajah Coomar Ramaput Singh* [2] and *Ramaswami Chettiar* v. *Oppilamani Chetty* [3] supported our view as also the new definition of "legal repre-

1. (1915) 29 M. L. J. 698. 2. (1872) 14 M. I. A. 605.
3. (1909) I. L. R. 33 M. 9=19 M. L. J. 671.

Bachu Soorayya v. Toomulorri Chinna Anjaneyalu.

Sadasiva Aiyar, J.

sentative" found in S. 2, clause 11 of the Civil Procedure Code Act V of 1908.). I might also refer to *Bisseswar Lal Sahoo* v. *Maharajah Luchmessur Singh* [1] and *Ishan Chundur Mitter* v. *Baksh Ali Souddagar* [2]. The case of a decree passed in a suit brought against a person in possession but who is not the heir of the deceased debtor's estate, must of course be treated as an exception to the general rule, that proceedings in execution of a decree do not bind the interest of any person who was never brought on the record as a party to the proceedings in the suit. (See *Kishen Chunder Ghose* v. *Mussammat Ashoorun* [3] as regards the general rule.) The decisions dealing with suits which had been instituted against a debtor before his death but were continued after his death till decree or after the decree in execution proceedings with the wrong person on record as legal representative are irrelevant for the consideration of the plaint before us, as pointed out by their Lordships of the Privy Council in *Khiarajmal* v. *Daim* [4]. In the present case defendants 3 and 4 contested the plaintiff's claim, not on the ground that the 2nd defendant was in possession of the plaint property and hence might be taken as the plaintiff's father's legal representative in some sense, but on the ground that the decree was passed for a debt of the plaintiff's father and hence is binding on the plaintiff, the question who was sued as plaintiff's father's legal representative or against whom the decree was obtained as such being immaterial according to the contention put forward by the appellants. I think such a contention cannot be supported, having regard to the decision in *Khiarajmal* v. *Daim* [5]. (See also *Madavarayadu* v. *Subbamma* [6].)

I would, therefore, dismiss the second appeal with plaintiff's costs.

Spencer, J.—I agree.

C. A. S.

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1. (1863) 6 I. A. 233
2. (1863) 1 Marshall's Reports, 614.
3. (1863) 1 Marshall's Reports, 647.
4. (1904) I. L. R. 32 C. 296 at 314.
5. (1904) I. L. R. 32 C. 296.
6. (1916) 31 M. L. J. 222.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE KUMARASWAMI SASTRI.

Vadamali Thiruvanatha Sevuga Pandia Thevar Avergal ... *Appellant** (*Defendant*).

v.

Sankaramoorthi Naidu ... *Respondent* (*Plaintiff*.,

Thiruvanatha Sevuga Pandia Thevar *v.* Sankaramoorthi Naidu.

Madras Estates Act - Ss. 3 cl. 11 (a), 143—Cesses—legality—Tests of— Kanganam —Kulavettu—Melvaram Urai—Kudivaram Uroi—Swathantram—Kangovi—Tiruppani—Kattalavuvasi—Ayyanar—Nature and legality of.

On a consideration of the evidence adduced in the case, their lordships held that the following cesses were legal and were payable by the ryots :...Kanganam ; Kulavettu ; Melvaram Urai, Kudivaram Urai ; Swathantram ; and thrashing ground rent in cases where the tenants had no thrashing floor. Their lordships held that the following cesses were illegal ;—Kattalavuvasi ; Kangovi; Ayyanar ; and Tiruppani.

Nature of the above mentioned cesses explained.

Discussion of principles on which legality of cesses is to be determined.

Second Appeal against the decree of the District Court of Ramnad at Madura in A. S. No. 503 of 1916 preferred against the decree of the Court of the Revenue Divisional Officer of Sivakasi Division in Summary Suit No. 240 of 1915.

A. Swaminadha Aiyar for appellant.

K. V. Sesha Aiyangar for Respondent.

The Court delivered the following :

Judgment :—The defendant Zemindar is the appellant. Plaintiff who is a ryot in the Zemindari sued under S. 55 of the Madras Estates Land Act for a decree directing the defendant to tender him a proper patta. He put in a patta which did not contain any provision for cesses that had been usually levied and objection was taken by the Zemindar to the form of the patta which he wanted to get. The Zemindar put in the patta Exhibit I which was granted to the plaintiff's predecessor-in-title which contained the following cesses which were described as *pothu selavu* or common expenses which were to go to the Zemindar (1) Ayyanar, (2) Kulavettu, (3) Kattalavuvasi, (4) Kanganam, (5) Melvaram Kottai Urai, (6) Swathantram, (7) Kudivaram Kottai Urai. It provided for two items to go to the tenant as common expenses and stipulated that after deducting the above items of common expenses one half of the paddy was to be taken by the landlord and the other half by

*S. A. No. 2198 of 1917. 24th September, 1918.

Thiruvanatha Sevuga Pandia v Sankaramoorthi Naidu.

the tenant. Out of the kudivaram thus taken by the ryot he was further to give the landlord (1) Kangovi (2) Thrashing ground rent and (3) Thiruppani.

It is not disputed that the land to which the patta claimed related is nunja and that varam rents are payable. The plaintiff in his evidence admits he has been paying the cesses to the Zemindar for the past 30 years and that his father was paying the cesses when he was alive and that all the tenants have been paying the cesses without complaint.

The Revenue Divisional Officer held that the cesses claimed by the Zemindar were payable "according to usage having the force of law" and that they must be included in the patta. On appeal the District Judge disallowed the cesses as illegal under S. 143 of the Madras Estates Land Act and held that plaintiff was entitled to the patta without any of the cesses being included.

The question for decision in this second appeal is as to the legality of all or any of the cesses claimed. As regards Kangovi and Kattalavuvasi and Ayyanar it is not clear what they are payable for or on what ground payment is based. The Zamin Karnam who was examined as defendant's first witness states that he does not know why Kangovi was collected. He says nothing about Ayyanar and Kattalavuvasi and the appellant's vakil is unable to throw any light on these cesses. These three cesses are not shown to have any connection with the holding or the rent payable.

The other cesses claimed stand on a different footing Kanganom is the fee for watching the harvest. Kulavettu relates to the expenses for keeping tanks in proper repair. Kudivaram Urai and Melvaram Urai are in respect of measuring the kudivaram and melvaram paddy. Swathantram is in respect of payment to village artisans. Tiruppani is the cess for repairing the village temple.

Rent is defined in S. 3, clause 11 (*a*) of the Estates Land Act as 'including any local tax, cess, fee or sums payable by a ryot as such in addition to the rent due in respect of land according to law or usage having the force of law'. S. 143 prohibits landholders from exacting from their ryots anything in addition to the rent lawfully payable by them rendering all stipulations and reservations for such additional rent void.

Thiruva natha Sevuga Pandia Thevar v. Sankara moorthi Naidu.

In considering whether any particular cess claimed and which has been paid for a series of years is enforceable or not the first thing to be considered is whether the cess claimed has any direct or proximate bearing on the purpose for which the land is let. If the cess is payable in respect of such purposes it will *prima facie* be one which is binding on the parties and the onus will be on the tenant to show that owing to some special circumstances it is not binding on him. Where the cesses are in their nature unconnected with the object for which land is let they can only be claimed by the landlord under a contract between him and the ryots supported by consideration or under a usage for which a legal origin is either proved or presumed from the nature of the case and a long course of payments. While on the one hand mere length of payment will not as pointed out in *Sundaram Aiyar* v. *Theethapa Mudaliar* [1] render a cess which is purely a voluntary one or which is on its face illegal acquire a binding character, payment during a long series of years will be presumptive evidence that the payment of a cess had a legal origin if the cess is of such a nature that a contract to pay it may reasonably be inferred.

Another distinction is whether the particular cess is paid out of the tenant's share of the varam or whether it is deducted out of the whole gross produce before the division of the varam is made. There is nothing to prevent both the sharers in the varam from agreeing that certain expenses which they think beneficial to both of them shall be met by them in common and the rest of the produce divided. So long it is not a device by the landlord to give himself a purely personal advantage the purpose for which the item is appropriated is immaterial. It will, of course, be open to the tenant to show that the purpose for which the cess was levied had failed or that the landlord has not been appropriating the sum to the purpose for which he levied it but otherwise there is no reason for releasing the tenant from his agreement.

Where the cess has no direct bearing on the purpose for which the land is let and is payable out of the tenants' share of the rent we think that the onus ought to be on the landlord to show that it was either part of the consideration for

1. (1917) 40 I. C. 159.

Thiruvanatha Sevuga Pandia Thevar v. Sankaramoorthi Naidu.

which the land was originally leased or that it is supported by consideration subsequently.

I do not think that because a cess has been held not to be binding on one estate it follows that it is not binding on other estates or *vice versa*. Each case must depend on the facts and reported decisions are only useful in so far as they lay down general principles which guide Courts in coming to conclusions as to the validity or otherwise of any particular cess.

In the present case Kanganom, Kulavettu, Melwaram Urai, Kudivaram Urai and Swathantram are set apart before division of produce between the landlord and tenant. Kanganom as pointed in *Arunachellam Chettiar* v. *Mangalam* [1] is clearly a cess which the landlord is entitled to levy as in case of varam tenure he is interested in seeing that he gets his due share of the harvest. Kulavettu which is a cess for keeping in the tanks in proper repair is for a purpose beneficial to the landlord and tenant and there is no reason why the cess should be disallowed. Reference was made by the respondent's vakil to *Sri Rajah Bomma Devara Venkata Narasimha Naidu* v. *Ramamma* [2], but the case has no application to the facts of the present case as in that case the finding was that the tank fell into disrepair several years ago when the anicut system was introduced by the Government in the Kistna District. The Zemindar did not repair the tank and the ryots derived no benefit in consideration of which the cess could be claimed. In the present case there is no allegation that tank water is not used by the respondent. Kudivaram Urai and Melvaram Urai are in respect of the measurement of the Melvaram and Kudivaram respectively. It is not denied that measurement of the paddy is necessary to determine the landlords' and tenants' share.

As regards Swathantram the cess is collected for payment to village artisans and servants and it is not shown that the tenants who have been paying this cess without any objection for several years receive no benefit. The cess was taken out of the gross produce before division and there is nothing either in the plaint or in the evidence adduced by the plaintiff to show that this cess is purely for the benefit of the landlord. In *Sree Sankarachari-Swamiar* v. *Varada Pillai* [3], it has been held that a cess for payment to village artisans is lawful.

1. (1915) I. L. R. 40 Mad. 640. 2. (1913) M. W. N. 551.
3. (1903) I. L. R. 27 Mad. 332.

Thiruvanatha Sevuga Pandia Thevar v. Sankaramoorthi Naidu.

Turning to the cesses (*Kangovi*, thrashing ground rent and *Tiruppani*) which in the patta granted to plaintiff's vendors are payable after division of the produce we have already disallowed Kangovi. Tiruppani is cess collected for repairing temples. This cess has been held to be purely voluntary in *Siriparupu Ramanna* v. *Mallikarjuna Prasada Naidu* [1], where the learned Judges (Muthuswami Aiyar and Best, JJ.) observed: "A duty to contribute to the expenses of a temple is not an ordinary incident of the relation of landlord and tenant, nor has it any connection with the jeroyati tenure on which the ryot holds his lands. *Prima facie*, the contribution is voluntary and unless the fee is shown to be a charge on the land, it cannot be treated as a payment which the Zemindar can legally compel the ryot to make." A similar view was taken by Benson and Bhashyam Aiyangar, JJ. In *Ramalingam Chettiar* v. *Ramasami Aiyar* [2].

As regards thrashing ground rent it is difficult to see why the cess should not be paid in cases where owing to the want of thrashing floor belonging to the tenant the parties have to pay for using another's. Where however the tenant has a thrashing floor the cess ought not to be levied.

We would modify the decree of the District Judge by allowing Kanganom Kulavettu, Melvaram Urai, Kudivaram Urai, Swathantram and thrashing ground rent in cases where the tenant has no thrashing floor. As regards the items which under the patta Exhibit I go to the ryot the landlord does not dispute that the tenant is entitled to them. These items will also be included in the patta so far as wet lands paying varam are concerned. The patta will issue in terms of Exhibit I with the above modifications so far as varam paying wet lands are concerned. The decree of the District Judge disallowing cesses will stand as regards Punjai land.

As the appellant has succeeded substantially and as the respondent came to court alleging that no cesses were due, we direct the respondent to pay the appellant's costs in this and the lower Appellate Court.

A. S. V.

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1. (1893) I. L. R. 17 Mad. 43=3 M. L. J. 207. 2 (1903) 13 M. L. J. 379.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR JOHN WALLIS, CHIEF JUSTICE AND MR. JUSTICE SESHAGIRI AIYAR.

Pathma Re Krishna Chettiar ... *Appellants** (*Plaintiff*).

v.

Mu Pa Venkatachella Chettiar and others. *Respondents* (*Defendants* 1 *to* 3, *etc.*

Krishna Chettiar v. Venkatachella Chettiar

Guardians and Wards Act (VIII of 1890) Ss. 34 and 35—Surety bond under S. 34—Right to sue on—Assignment by court, when principal bond lost, if valid—Breach of the conditions of the bond, what constitutes—Remedy in case of breach.

The Court is the obligee under a bond executed by sureties under S. 34 (a) of the Guardians and Wards Act and is alone entitled to sue on the bond in the absence of an assignment in due form of law. The fact that the principal bond executed by the guardian is lost would not prevent the surety bond being duly assigned.

In a suit by the assignee of a surety bond under S. 35 of the Guardians and Wards Act, it was found that the bond had been assigned by the judge on the ground that there was a *prima facie* case of maladministration against the guardian though there had been no order of the Court directing the guardian to exhibit accounts or to pay or apply the balance found due under S. 34 cl. (b) to (e) of the Guardians and Wards Act. *Held* that there was no breach of the conditions of the bond and that their suit was not maintainable.

Obiter :—In the case of bonds under the Guardians and Wards Act, the proper procedure would be to get an order to pay against the Guardian under S. 34 (d) or a decree against him, and if he fails to satisfy the order or decree, then to sue the sureties in respect of this breach as to which there will be no defence and the period of limitation is that prescribed by art. 68 of the Lim. Act, except where the bond which charges immoveable property.

Appeal against the decree of the Court of the Subordinate Judge of Kumbakonam in O. S. No. 63 of 1915.

A. Krishnaswami Aiyar and *G. Gopalakrishna Aiyangar* for Appellants.

The Hon. The Advocate General, S. T. Srinivasagopalachari, K. Bhashyam and *K. Narasimha Aiyangar* for Respondents.

The Court delivered the following

Wallis, C. J.

Judgments :—*The Chief Justice.*—This is an appeal from the decree of the Subordinate Judge of Kumbakonam in so far as it dismissed the suit brought by the plaintiff as assignee of a surety bond Exhibit A, dated 21st April 1896, charging the immoveables therein mentioned for the due performance by the 1st defendant of his obligations under the bond given by him to the District Court under S. 34 (a) of the Guardians and Wards Act

* A. S. No. 133 of 1917. 22nd October, 1918.

Krishna Chettiar v Venkatachella Chettiar.

Wallis, C. J.

as guardian of the plaintiff who was then a minor. The immoveable properties of the other sureties being insufficient, the 1st defendant added certain properties of his own and became a party to the surety bond, Exhibit A, as well as to the principal bond which is now missing. The Subordinate Judge passed a personal decree against the guardian and the 1st defendant who did not contest the suit, and otherwise dismissed it on the ground that the plaintiff had no right to sue on the bond Exhibit A, at the date of the suit, as the principal bond had not been assigned to him and there had been no regular assignment to him of the surety bond Exhibit A but only an order of the District Court that it should be assigned. He also dismissed the suit on the ground that the plaintiff had failed to prove what were the terms of the principal bond which was missing, and held that the defendants who are alienees from the sureties under Exhibit A took without notice and are exempt from liability.

As regards the first point, I am of opinion that the plaintiff had no title to sue on Exhibit A without an assignment to him by the court both of the principal bond and of the surety bond Ex. A; but I do not think the case can be satisfactorily disposed of on this ground. The District Judge has since assigned Exhibit A by a registered instrument, and though the principal bond has not yet been assigned, we might, I think, accept the assignment even at this late stage if this was the only difficulty in the plaintiff's way. The fact that the principal bond is lost would not prevent its being duly assigned. The Ecclesiastical Courts were required by a Statute of Henry VIII to take bonds with sureties from persons to whom they granted administration of the estates of deceased persons, and a Statute of Charles II settled the terms of the bond to be so taken. There was a right of action on these bonds in the Common Law Courts, but the Ecclesiastical Judge to whom the bond had been given did not sue himself, but, as stated in *Boton* v. *Powell* [1], the Ecclesiastical Court made an order in favour generally of one of the next of kin that the bond be "attended with" and the party in whose favour the order was made was allowed to sue in the name of the Ecclesiastical Judge to whom the bond had been given. Whether

1. (1852) 2 De G. M. and G. 1 at 21.

Krishna Chettiar v Venkatachella Chettiar.

Wallis, C. J

under any circumstances the sureties could be proceeded against in Equity without such an order of the Ecclesiastical Court was discussed in the case just mentioned. The Probate Act of 1857 first made these bonds assignable and its provisions in this respect have been reproduced in the Indian Succession Act, the Probate and Administration Act, 1881 and lastly in Ss. 34 and 35 of the Guardians and Wards Act, 1890. The Court now being the obligee under the bond is alone entitled to sue on it in the absence of an assignment in due form of law.

In the present case I feel constrained to hold in the present state of the evidence, that the suit fails on the broad ground that no breach of the conditions of the bond Exhibit A has been proved. S. 34 (a) of the Guardians and Wards Act obliges the guardian, if so required to give a bond to the Judge of the Court " engaging duly to account for what he may receive in respect of the property of the ward". By S. 34 (b) he is to deliver an inventory within six months and by S. 34 (c) he is to............" exhibit his accounts in the Court at such times and in such form as the Court from time to time directs," and by S. 34 (d) he is " to pay into the Court the balance due from him on those accounts or so much thereof as the Court directs." The form of bond prescribed in Form 93 of the Civil Rules of Practice 1902, clearly follows the provisions of S. 34 (c) and (d) just set out, the condition of the bond being that the guardian shall duly account " at such period as the Judge shall appoint and shall duly pay or dispose of the balances which shall from time to time be found to be due from him as the said Court or Judge has directed, or shall hereafter direct." No doubt, this form was not in force in 1896 when the 1st defendant as guardian executed the principal bond which is now missing, but there is no reason to assume that the bond then executed by the 1st defendant was of a more onerous character than the form now prescribed. Now to constitute a breach of this bond there must be a failure either duly to account at a period directed by the Court, or a failure to pay as ordered by the Court a balance found due from him; and where there is no evidence of any order to account within a fixed time or to pay any balance within a fixed period, there is no breach of the obligation of the bond. This follows from the language of the bond and has been expressly ruled in the case of a similar

Krishna Chettiar v. Venkatachella Chettiar.

Wallis, C J.

provision in the old statutory form of administration bond. *Archbishop of Canterbury* v. *Tappen*[1] and *Archbishop of Canterbury* v. *Robertson*[2]. The latter case also deals with the question of what amounts to a breach of the condition well and truly to administer the estate in the old form of administration bond. To establish a breach of that condition it was not necessary to show a failure to obey a specific order of the Court. Similarly under S. 81 of the Probate Act of 1857 the bond is to be conditioned for duly collecting, getting in and administering the estate of the deceased, language followed in S. 256 of the Indian Succession Act and S. 78 of the Probate and Administration Act ; and therefore in the case of these bonds it is enough to show a failure to administer or collect and it is not necessary to show a failure to obey a specific order of the Court. Where, however, as we must assume in the present case, the only conditions in the bond were to exhibit accounts when ordered by the Court and to pay or apply the balance found due as directed by the Court, if there is no order there is no breach and the suit on the bond necessarily fails. There is no evidence of any order to account or of any order to pay in the present case. All the District Judge did was to direct the assignment of the bond on the ground that there was a *prima facie* case of maladministration against the 1st defendant. In the case of bonds under the Guardians and Wards Act the proper course appears to be to get an order to pay against the guardian under S. 34 (d) or a decree against him, and if he fails to satisfy the order or decree then to sue the sureties in respect of this breach as to which there will be no defence, and the article of Limitation will be article 68 unless, as in the present case, the bond charges immoveable property, when that article may be inapplicable. It is unnecessary to consider this point, or the other question raised in argument before us as to when time begins to run when the condition in the bond is duly to administer. In my opinion the appeal fails and must be dismissed with costs against defendants 3 to 9 the alienees. As those grounds apply also to the decree against the 1st defendant we set aside that decree also but without costs in the exercise of our powers under O. 41, R. 33.

Seshagiri Aiyar, J.—I agree.

A. V. V.

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1. (1828) 8 B. and C. 151.   2. (1833) 1 Cr. and M. 690.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SADASIVA AIYAR AND MR. JUSTICE SPENCER.

Narasimhayya ... *Appellant Plaintiff**

v.

Srinivasayya and others ... *Respondents. (defendants.)*

Narasimhayya *v.* Srinivasayya

Interest—Post diem interest—Mortgage bond—Principal and interest repayable on a fixed date—Agreement to pay interest on unpaid arrears of interest—No provision for post diem interest—Liability of debtor—Extent of.

Post diem interest is recoverable on the general promise by the debtor to be liable for interest, though a definite term is fixed in the bond for re-payment of the principal and interest. If the liability under the general undertaking to pay interest is further extended, by what may be styled an appurtenant undertaking to pay interest upon arrears of interest and such further undertaking is found in the same document following the provision for payment of interest, it might be assumed that the parties intended that both the principal and the appurtenant undertaking should govern the liability of the debtor for *post diem* interest.

Mathura Das v. *Raja Narendra Bahadur* 1, *Bindesri Naik v. Ganga Saran Sahu* 2, *Ghantayya* v. *Papayya* 3, *Ramanathan Chetty* v. *Nur Muhammad Marcayar* 4, foll.

Second Appeal against the decree of the Court of the Subordinate Judge of South Canara in A. S. No. 59 of 1917 (A. S. No. 178 of 1916 on the file of the District Court of South Canara) preferred against the decree of the Court of the District Munsif of Karkal in O. S. No. 497 of 1915.

B. Sitarama Rao for Appellant.

K. Y. Adiga for Respondents.

The Court delivered the following

Judgment :—We think we are bound by the Privy Council decisions in ***Mathura Das*** v. ***Raja Narendra Bahadur*** [1], and ***Bindersi Naik*** v. ***Ganga Saran Sahu*** [2], and the decisions of this Court in ***Ghantayya*** v. ***Papayya***[3] and ***Ramanathan Chetty*** v. ***Nur Muhammad Marakkayar*** [4], to hold that *post diem* interest is payable on the general promise by the debtor to be liable for interest though a definite term is fixed in the bond for re-payment of the principal and interest. If the liability under that general undertaking to pay interest is further extended by another undertaking (which may be called appurtenant to the principal undertaking) to pay interest upon arrears of interest and which

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* S. A. No. 1561 of 1917. 30th October, 1918.

1. (1896) I.L.R. 19 A 39=6 M.L.J 214
2. (1897) I. L. R. 20 A. 171.
3. (1899) I. L. R. 23 M. 534.
4. (1900) 11 M. L. J. 183.

further undertaking is found in the same document following the provision to pay interest it is difficult to hold that the parties intended that only the principal undertaking should apply to the question of the liability for post diem interest and not the appurtenant undertaking also.

Narasimhayya v. Srinivasayya

As regards *Chajmal Das* v. *Brij Bukanlal* [1], that was decided before *Mathura Das* v. *Raja Narindra Bahadur* [2], and their Lordships, after reluctantly agreeing with the High Court that there was no covenant to pay post diem interest gave interest by way of damages taking the principal undertaking alone as a guide for the measure of damages and not the appurtenant undertaking also. *Thathothathil Pokkar* v. *Ramachandra Shenoy* [3] is a similar case. These decisions are of no assistance when considering the question as to whether compound interest is allowable where post diem interest is granted on the covenant and not as damages in the absence of a covenant. On the other hand, the decisions in *Bindesri Naik* v. *Ganga Saran Sahu* [4] and *Ramanathan Chetty* v. *Nur Muhammad Marakkayar* [5] proceed on the view that both the covenants can be availed of by the creditor in respect of post diem interest.

We therefore allow the second appeal and restore the decision of the District Munsif dismissing with costs the defendants' appeal to the lower appellate court. The respondents will pay appellant's costs in this court. Six months time will be allowed for payment from this date.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR JOHN WALLIS, CHIEF JUSTICE AND MR. JUSTICE SESHAGIRI AIYAR.

Vaithilinga Mudaliar and others ... (*Respondent* * (*Petitioners*)

v.

Srirangathanni and others ... *Respondents* (*Defendants.*)

Vaithilinga Mudaliar v. Srirangathanni.

Civil Procedure Code, S. 110 and O. 45, R 5—Leave to appeal to his Majesty in Council—Single suit on different causes of action against several defendants—

* C. M. P. Nos. 2389, 2076, 1761, etc., of 1917 22nd October, 1918.

1. (1895) I. L. R. 17 All. 511. (P. C) 2. (1896) I. L. R. 19 All. 39.
3. (1914) 16 M. L. T. 478 4. (1897) I. L. R. 20 All. 171 (P.C.)
5. (1900) 11 M. L. J. 183 (F. B.)

Vaithilinga Mudaliar v. Sriranga-thanni

Separate appeals by defendants to the High Court—Single appellate decree drawn up—Civil Rules of Practice, Rule 105—Leave to appeal to the Privy Council—Subject-matter of each appeal to be taken into consideration.

Plaintiffs sued as next reversioners on the death of the widow of the last male owner, for recovery of possession of several properties which were alleged to have formed part of the estate of the last male owner and which were in the possession of different alienees who were impleaded as defendants. The plaintiffs had really different causes of action against the various defendants but they were allowed, according to a well-established practice, to join all of them in one suit. The Court of first instance gave a decree in favour of the plaintiffs. The several defendants filed separate appeals to the High Court, as regards the properties in their possession but only one appellate decree was drawn up by the High Court in accordance with Rule 105 of the Civil Rules of Practice. On an application for leave to appeal to the Privy Council against the decision of the High Court in each of the appeals.

Held, that leave could be granted only in those cases whose subject-matter was of the value of Rs. 10,000 or upwards under S. 110 of the Code of Civil Procedure.

Petitions presented by the plaintiffs under O. 45, R. 3, Civil Procedure Code, praying for the grant of a certificate to entitle the petitioners to appeal to his Majesty in Council against the decision of the High Court in A. S. Nos. 206 and 207 of 1918 and Nos. 11, 12 and 14 of 1909 preferred against so much of the decrees of the Court of the Subordinate Judge of Negapatam in O. S. No. 26 of 1905 as is against the several defendants concerned therein.

R. Gopalaswami Aiyangar for *The Hon. T. Rangachariar*, Vakil for the petitioners in C. M. P. No. 2389 of 1917.

T. V. Gopalaswami Mudaliar for the Petitioner in C. M. P. No. 2705 of 1917.

S. Gopalaswami Aiyangar, Vakil for the Petitioners in C. M. P. No. 1761 of 1917.

A. Krishnaswami Aiyar and *A. S. Viswanatha Iyer* for the Respondents C. M. P. No. 2389 of 1917.

The court made the following

Order :—In this case the plaintiffs sued as next reversioners on the death of the widow of the alleged last male holder, and joined various defendants who were in possession of properties which, they alleged, formed part of the estate of the last male owner. These were really different causes of action against the defendants, but they were allowed, according to a well established practice, to be joined in the same suit. The Subordinate Judge passed a decree in favour of the plaintiffs

Vaithilinga Mudaliar v. Sriranga-thanni.

against the alienees of the several items of property. These alienees and the other defendants filed separate appeals in the High Court, and the appeals of some of the defendants alienees were allowed on the ground that the items in question were not shown to have formed part of the estate of the last male owner. Although several separate appeals were filed, in accordance with Rule 105 of the Civil Rules of Practice only one appellate decree was drawn up. Some of the appeals of the defendants-alienees which were allowed by us relate to items of property which are said to be of less value than Rs. 10,000, and it is objected by these defendants as respondents to the petitions that, in these circumstances, the petitioners are not entitled to a certificate under S. 110, Civil Procedure Code. We think that the fact that only one appellate decree was drawn up in all these appeals cannot affect the rights either of the appellants or the respondents in those appeals with reference to a further appeal to His Majesty in Council, and that the applications must be considered as if a separate decree had been passed in each appeal. Otherwise, the effect of the Civil Rules of Practice would be to interfere with the right of appeal or the right to retain the judgment of this court without appeal, both very valuable substantive rights as has often been pointed out. This is a matter with which we have no power to interfere by means of the Civil Rules of Practice. There is an affidavit by one Srinivasa Iyer stating that the value of the subject-matter of appeal No. 12 of 1909 in this court, filed on behalf of the 36th to 38th defendants, is less than Rs.10,000 and there is no counter-affidavit. No leave therefore can be granted to appeal from the decree in that appeal. There is a contest as regards appeal No. 11 of 1909 in this court as to whether the subject-matter of the suit is of the value of Rs. 10,000 or not, but having regard to the description of the land, we are quite satisfied that its value exceeds Rs.10,000 and see no reason to call for a report. We accept the affidavit by one Sambasiva Aiyar filed on behalf the Petitioners in C. M. P. 2389 of 1917 in that appeal. As regards the appeal against appeal No. 10 of 1909 (C. M. P. No. 1761 of 1917) we are prepared to certify that there is a substantial question of law. As regards appeal No. 14 of 1909 the petitioners desire to question the principles laid down in *Dharmapuram Pandara San-*

Vaithilinga Mudaliar v. Sriranga-thanni.

nadhi v. *Virapandian* [1] and we are prepared to certify that this appeal involves substantial questions of law. In the other appeals also, we certify that there are substantial questions of law. As regards respondents Nos. 19 to 21 in C.M.P.No. 2389 of 1917 (*i.e.*, against Appeal No. 12 of 1909) the petition is dismissed with costs. As regards the same respondents *i.e.*, respondents Nos. 11-13 in (C.M.P.No. 2705 of 1917 (*i.e.*, against Appeal No. 12 of 1909) the petition will be dismissed, but there will be no costs. In the petitions in which leave has been granted, costs will be costs in the cause. There will be only one printing in C. M. P. Nos. 2389, 2705 and 1761 of 1917.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE KUMARASWAMI SASTRI.

Kadir Mohideen Saheb and others ... *Appellants* (Plaintiffs) and L. R's of the deceased 2nd Defendants.)*

v.

Syyed Abbubukarr Saheb. ... *Respondent (Defendant.)*

Mohideen Saheb Abbubukarr Saheb.

Indian Limitation Act S. 12 (2) and (3)—Computation of time for the purpose of appeal—Long vacation of the Lower Court—Notification that copies will be supplied in the long vacation—Whether the period of the vacation can be excluded.

Where a notification is published that copies will be granted during the long vacation, the whole period of the long vacation cannot be excluded as the period for granting a copy of the judgment or decree ; on the other hand, the period of the vacation must be reckoned in computing the period of limitation.

Second Appeal against the decree of the Court of the Subordinate Judge of Coimbatore in A. S. No. 142 of 1916 preferred against the decree of the Court of the Principal District Munsif of Erode in O. S. No. 595 of 1915.

T. Narasimha Aiyangar, K. Rajah Aiyar and R. Ganapathy Aiyar for appellants.

S. T. Srinivasagopalachariar for respondents.

The Court delivered the following

Judgment :—A preliminary objection is taken that this appeal has been filed out of time. It was originally filed on

* S. A. No. 1420 of 1917. 11th September, 1918.

1. (1898) I. L. R. 22 M. 302.

Mohideen Saheb v. Abbubukharr Saheb.

the 30th July 1917 with a certified copy of the decree. The decree was passed on the 31st March 1917, and therefore filing on the 30th July was considerably more than 90 days after the decree. The time occupied in obtaining the certified copy is only 7 days and assuming that this presentation on the 30th July was a valid presentation, the appeal is clearly time barred. If this presentation is not valid we have to consider whether the presentation on the 9th August with the printed copies was in time. The Application for printed copies was made on the 11th April and printing charges were called for on the 28th April The court closed for the annual vacation on the 29th. On the 5th May the copy application was dismissed for default of payment of printing charges and on the re-opening day, 2nd July, a fresh application for copies was put in and they were supplied on the 6th August. The question is whether the appellant was bound to pay the printing charges called for on the 28th April before the re-opening of the Court or on the 2nd July, or to put it in another form whether the copy application was rightly dismissed on the 5th May for non-payment, for if the period of the vacation cannot be deemed to be part of the period requisite for obtaining copies, the appeal is certainly out of time. It has been recently held by a Bench of this Court to which one of us was a party in *Kumuru Appalaswami* v. *Palli Narayanaswami* [1] that when a party failed to take delivery of a copy during the vacation, he was not entitled to deduct the period intervening between the time when the copy was ready and the end of the vacation, for in accordance with the High Courts Rules, a notification had been published that arrangements would be made for granting copies during the adjournment of the Court. In accordance with that case the period of the vacation here also could not be deemed to be requisite for obtaining copy, for there was a notification that arrangements would be made. In the Coimbatore Court from which this appeal is filed, the notification instead of saying that arrangements will be made for grant of copies reads, "Arrangements be made for delivery of copies," and it is contended that this did not mean that money will be received for printing charges. We think, however, that if arrangements are made for delivery of copies

1. (1918) 36 M. L. J. 62.

Mohideen Saheb v. Abbubukhar Saheb

and applications are allowed to be put in up to the close of the last working day, it necessarily follows that arrangements will be made for all the necessary steps being taken between the application for the copy and the final delivery, and one of these steps is the payment of printing charges. That the appellant was aware that this was the practice shown by his affidavit in which he says that he remitted the money on the 1st May to his Vakil and that his Vakil omitted to pay it into Court. The whole period therefore of the vacation must be reckoned in computing the period of limitation ; and the appeal is certainly out of time. Appellant cannot rely on the cases reported in *Tukaram Gopal* v. *Pandurang Sadaram* [1], *Siyadat-un-nissa* v. *Muhammad* [2], for he did not file the application on the day after he received the copies, and was guilty of a day's delay in paying printing charges.

It however appears that the only default committed by the appellant was in not seeing that his vakil paid in the printing charges he remitted. Except for this omission, he was throughout diligent and lost no time again in applying for copies and presenting the appeal after they were granted. Under S. 5 of the Limitation Act, therefore, we excuse the delay.

[Ed. Their Lordships then deal with the merits and affirm the decision of the Subordinate Judge, subject to a declaration of the plaintiffs' rights.]

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH.]

PRESENT :—MR. JUSTICE ABDUR RAHIM, MR. JUSTICE AYLING, MR. JUSTICE OLDFIELD, MR. JUSTICE SADASIVA AIYAR AND MR. JUSTICE COUTTS TROTTER.

F. B.

Chinnappan Chetty v. The Secretary of State for India.

Chinnappan Chetty ... *Appellant* * (*Plaintiff*).

v.

The Secretary of State for India in Council through the Collector of Madura. *Respondent* (*Defendant*).

Madras Irrigation Cess Act (VII of 1865) S. 1—Madras Act V of 1900—"River belonging to Government," meaning of—Ownership of Government dependent on ownership of the bed and banks of a river—Madras Land Encroachment Act (III of 1905). S. 2, scope and effect of.

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1. (1901) I. L. R. 25 Bom. 584 at 586. 2. (1897) I. L. R. 19 All. 342.

F. B. Chinnappan Chetty *v.* The Secretary of State for India.

A river having its source in hills belonging to the government flowed through ryotwari lands, then through a Zemindari and again through a government village. A ryot of the zemindari took water from the river at a place within the limits of the Zemindari for irrigating zemindari lands. The Government claimed to levy a cess under S. 1 of the Madras Irrigation Cess Act (VII of 1865) in respect of the use of the water by the zemindari ryot.

Held, negativing the claim of the government, that as the government was not the owner of the bed or the banks of the river at the place where water was taken by the zemindari ryot, the river in question could not be said to be a river belonging to the Government for the purposes of Act VII of 1865.

The effect and scope of S. 2 of the Madras Land Encroachment Act (III of 1905) discussed.

Kandakuri Mahalakshmamma v *The Secretary of State* [1] dissented from.

Second Appeal against the decree of the Court of the Temporary Subordinate Judge of Madura in A. S. No. 11 of 1915, preferred against the decree of the Court of the District Munsif of Dindigul in O. S. No. 97 of 1912.

The Court (Sir John Wallis, Chief Justice and Mr. Justice Oldfield) made the following

ORDER OF REFERENCE TO A FULL BENCH.

Wallis, C. J.

The Chief Justice:—The meaning of the words "river or stream belonging to the Government" in Madras Act VII of 1865 has given rise to much diversity of opinion in recent cases in this Court:— *Kandukuri Mahalakshmamma Garu* v. *The Secretary of State for India* [1], *Secretary of State for India* v. *Ambalavana Pandara Sannadhi* [2], *Secretary of State* v. *Janikhiramayya* [3], *Zamindar of Kapileswurapuram* v. *Secretary of State* [4], *Rajagopala Charyulu* v. *Secretary of State* [5], *Sri Rajah Simhadri Raju* v. *Secretary of State* [6], *The Secretary of State for India* v. *Janikiramayya* [7], *Secretary of State for India* v. *Maharajah of Bobbili* [8], *Secretary of State for India* v. *Ambalavana Pandara Sannadhi* [9]. In the still more recent case in *Kandukuri Balasurya Prasadha Row* v. *Secretary of State for India* [10], Lord Parker delivering the judgment of the Judicial Committee considered it unnecessary to decide the point, as in their Lordships' opinion the appellants were entitled to succeed on either view. The case was accordingly dealt with at page 181 on the assumption that the river in question belonged to Government and at page 183 on the assumption that it did not. There is, however, some discussion in an earlier passage of the judgment at page

1 (1910) I. L. R. 34 M. 295=20 M. L. J. 823
2. (1910) I. L. R. 34 M 366
3. (1913) I. L. R. 37 M. 322.
4. I. L. R. 37 M. 355 (Foot note)
5. I. L. R. 38 M 997.
6. (1914) I. L. R. 39 M. 67
7 (1915) 29 M. L. J. 389.
8. (1915) 30 M. L. J. 163.
9. (1917) 33 M. L. J. 415.
10. (1917) L. R. 44 I. A. 166=40 M. 886=33 M. L. J. 144.

F. B. Chinnappan Chetty v. The Secretary of State for India.

Wallis, C J.

173. " In the next place, it is by no means easy to say what is meant by a river or stream" belonging to the Government. The same expression in an Act of the United Kingdom would probably connote a Government ownership of the bed or the banks of the river: but it is quite possible that the law of the Madras Presidency recognises some proprietary right on the part of Government in the water flowing in rivers and streams. The law of the Madras Presidency as to rivers and streams certainly differs in some respects from English Law—*Fischer* v. *Secretary of State for India* [1]. Further, the Madras Act III of 1905 appears to enact that (*inter alia*) all standing and flowing water not the property of private individuals is the property of Government, but subject to the natural and easement rights of other landholders. If this section be relied on, it is a nice problem whether a riparian owner, who is exercising his natural or prescriptive right of taking water from a natural stream for purposes of irrigation, is taking water from a stream belonging to the Government within the meaning of the Cess Act. If he is, the natural and prescriptive rights of riparian owners are seriously diminished by the Act and, where the Government have not expended money in improving the natural stream, apparently without any sort of *quid pro quo*."

In view of the great diversity of views expressed in this Court and in the light of the above observations, it appears desirable that there should be binding decision of this Court as to the question which has again arisen in the present case. What we have to see is which of these meanings is more in conformity with the intention of the Legislature which passed the Act of 1865, and this intention is to be gathered from a careful consideration of the provisions of the Act and of the preamble. As has often been said, the preamble is as it were a key to the understanding of the Act and "may legitimately be consulted for the purpose of solving any ambiguity, or of fixing the meaning of words which may have more than one, or of keeping the effect of the Act within its real scope, whenever the enacting part of it is in any of these respects open to doubt." Maxwell, Fifth Edition, page 69. At the same time "the preamble cannot restrict or extend the enacting part, when the language and the object and scope of the Act are not open to doubt. It is not unusual to find that the enacting part is not exactly co-extensive with the preamble. In many Acts of Parliament, although a particular mischief is recited, the legislative provisions extend beyond it." Maxwell at page 74.

In Act VII of 1865 the enactment goes beyond the preamble, as has often been observed, most recently in Lord Parker's judgment, if now the reason for this can be ascertained, it will help to define more cearly the scope and purport of the Act and so throw light on the present

1. 1908) I L R 32 Mad. 141=19 M. L. J. 131.

F B.

Chinnappan Chetty v. The Secretary of State for India.

Wallis, C. J.

question. The explanation is, I think to be found in the fact of revenue history which is referred to in the judgments of Sankaran Nair, J., especially in Second Appeal No. 573 of 1911, *Zamindar of Kapileswarapuram* v. *The Secretary of State* [1] that, at the time the Act was passed and for reasons which do not concern us, the Secretary of State was pressing on the Madras Government the policy of showing the water rate on irrigated land separately from and as additional to the assessment fixed on the land as dry.

If now we read the Act as originally passed, in the light of this knowledge, it is apparent that it was drafted in deference to this policy so as to give effect or enable effect to be given to it, and that this is the explanation of the fact that the body of the enactment goes beyond the preamble and enables the statutory rate to be imposed irrespectively of the question whether or not the water is from a source on which public expenditure has been incurred and also irrespectively of the question whether the irrigation is old or new. Though this object is not mentioned in the preamble it is brought out in the title, which is "an Act to enable the Government to levy a separate cess for the use of water supplied for irrigatoin in certain cases". Section 1 which is applicable to ryotwari holdings, enabled Government "to levy at pleasure, on the land so irrigated a separate cess for the use of the water which cess shall be additional to any land assessments that may be leviable on the said land as unirrigated or punja" in accordance with the policy then favoured by the Secretary of State, and declared that these provisions should extend to permanently settled estates to the extent to which they were not entitled by virtue of engagements with Government to irrigation free of separate charge. It is now settled by their Lordships' decision after much divergence of opinion in this Court that the owners of these estates are entitled to make the fullest use of the facilities for irrigation which existed at the date of their grants without incurring liability to pay water cess under the Act.

We have thus what appears to me to be an adequate explanation of the fact that the Act goes beyond the preamble by providing for the imposition of the statutory separate cess, not only where expenditure from Government funds has been incurred in the construction and improvement of works of irrigation and drainage, the case contemplated in the preamble, but also in the terms of "whenever water is supplied or used for the purposes of irrigation from any river stream......belonging to Government". It may be said, and truly, that in ryotwari tracts the system of charging separately a dry rate of

1 I. L. R, 37 Mad 355, 356, (Foot note.)

F. B.

Chinnappan Chetty v. The Secretary of State for India

Wallis, C. J.

assessment and a water rate might have been introduced by Government without any fresh legislation, and that in the case of permanently settled estates it has only been introduced by the Act in the very limited class of cases in which the statutory cess is payable in such estates. Whether for the purpose of complying with the policy of the Secretary of State or for whatever other reason the legislature proceeded in this manner, we are only concerned with it in so far as it throws light on the meaning with which the words "belonging to Government" were used in the Act. As already pointed out, this much seems clear that they were inserted to make it plain that the cess was to be imposed in cases not coming within the preamble.

In an Act of the United Kingdom Lord Parker says they would probably connote a government ownership of the bed or the banks of the river, that is to say, that is the meaning they would have *prima facie* in an Act drafted by an English Lawyer and it must be remembered that this Act, as appears from the papers referred to in some of the earlier cases, was drafted by the Government Pleader who was then an English Barrister. Now if for a moment we apply that meaning to the Act, we find that in ryotwari tracts it empowers Government to levy the separate water-cess in all cases where the banks and bed or at any rate one bank and half the bed of the irver or stream are owned by Government. This comprises nearly the whole irrigated area in ryotwari tracts. There must of course be some cases in which ryotwari tracts are irrigated under easement rights from rivers of which Government has not the ownership of the bed and banks, but such cases must be comparatively rare, and, as already pointed out the desired separation into dry rate and water rate could be effected as regards them if so desired without legislative authority. As regards permanently settled estates also this meaning appears adequate, because water taken pursuant to natural or easement rights existing at the date of the grant from rivers and streams the banks and beds of which are in permanently settled estates is not chargeable under the Act, unless the supply has been improved at the public expense—a case expressly provided for in the Act; and cases of water being taken in excess of such rights are too rare to require legislation of this character and could be dealt with under the ordinary law by restraining the user. Not only then is the sense that in which the words would *prima facie* be used by an English lawyer, but it is found to correspond with the scope of the Act, and it has also the great advantage over the rival meaning of giving some effect to the words "belonging to" which must have been intended by the framers of the Act to have some effect and not to be purely otiose or even misleading as applied to river and streams. If all streams and rivers in the Presidency belong to

F B.

Chinnappan Chetty v. The Secretary of State for India.

Wallis J. C.

Government, the words "belonging to" would not have been made applicable to rivers and streams and the section would have read, 'whenever water is supplied or used for purposes of irrigation from any river or stream, or from any channel, tank, or work belonging to, or constructed by Government." This goes to show that these words were applied to rivers and streams because the framers of the Act proceeded on the view which English lawyers might be presumed to take, that the ownership of the river at any point depended on the ownership of the banks and bed.

On the whole, as a result of the further consideration which I have now given to the subject, I am inclined to think that for the purposes of Act VII of 1865 the ownership of the river or stream was intended to depend on the ownership of the bed and banks. It is, as I have said, desirable that there should be a binding decision on this question, and also supposing this to be so, on the further question as to the effect if any of Act III of 1905.

The somewhat exceptional circumstances of the present second appeal are that there is a finding that water has been taken for irrigation in excess of natural and easement rights from a river at a place where the banks and bed belong to the Zamindar. The river is one which rises in hills belonging to Government and passes through ryotwari tracts before entering the Zamindari. I would therefore refer to a Full Bench the question, is the river in question a river belonging to Government within the meaning of Act VII of 1865.

Oldfield, J.

Oldfield, J.—I agree to the reference proposed. But I desire to say that in doing so I commit myself to no opinion as to the legitimacy of resort to the matter referred to in the judgments in *Zamindar of Kapileswarapuram* v. *Secretary of State for India* [1] as a ground of decision or as to the comprehensive character of its effect.

T. R. Venkatarama Sastri (*K. S. Ramabhadra Iyer* with him) for appellants:—The point is whether the river in question is a river belonging to Government within the meaning of S. 1 of Madras Act VII of 1865 as amended by Act V of 1900.

[*Coutts Trotter, J.*: Was a new right to levy cess created by the Act ?] Yes.

[*Oldfield, J.*—The Sovereign power in this country had the control of irrigation and levied some charge for it even in pre-British days.]

The share of the crops taken by the State from wet lands was higher in value that the share on dry lands. Except in this indirect way no separate charge was levied. The preamble to Act VII of

1. I. L. R. 37 Mad. 355.

F. B.

Chinnappan Chetty v. The Secretary of State for India.

Wallis, C. J.

1865 refers to the necessity of getting a return for expenses incurred by Government in maintaining, improving and constructing works of irrigation. The section goes much further than the preamble. *Secretary of State* v. *Mahadeva Sastri* [1], *Prasada Row* v. *Secretary of State* [2]. The question then arises as to the meaning of the expression river belonging to Government in S. 1 of Act VII of 1865. Under the English law the bed of tidal and navigable rivers belongs to the Crown. In the case of non-tidal and non-navigable rivers the owners of land on the banks of the river are owners of the soil of the river *usque ad medium filum aquae*. In neither case is flowing water of the river the subject of ownership. If a stream rises and terminates entirely within the limits of a person's land he is its owner in the fullest sense. Where a stream, however, passes through the lands of a number of persons each one of them is entitled to use the water of the stream as it passes through his land as a natural advantage belonging to the land. This is known as a riparian right. This riparian right is a valuable right and is often spoken of as a right to property. The water of the stream flowing past a man's land is temporarily and usufructuarily his property. He can use it subject to the similar rights of lower riparian owners. If we speak of flowing water as belonging to any person, then proprietorship over it such as it is, can only be based on the ownership of the bed and the banks of the stream. Halsbury Vol. 28, p. 358. *Busk* v. *Trowbridge Water Works Co.* [3], construing S. 6 of the Water Works Clauses Act, 1847; *Stone* v. *Corporation of Yeovil* [4]; *Mason* v. *Hill* [5]; Blackstone's Commentaries, 18.

For the purposes of Act VII of 1865, the ownership of a river at any point depends on the ownership of the bed and the banks. [Does Act III of 1905 affect the position ?] Act III of 1905 was passed with a view to legalise the levy of penal assessment on land (See preamble). S. 2 of that Act is borrowed from S. 37 of Bom. Land. Rev. Code (V of 1879). S. 2 read with the preamble makes it clear that only the beds of rivers and streams and the *land* covered by standing or flowing water were meant to be included. There is no declaration of ownership of water standing or flowing apart from the land. The section is no doubt inartistically worded. *Secretary of State* v. *Ambalavana Pandara Sannadhi* [6].

The expression 'river' denotes not only the body of flowing water but also the bed and the banks. *Mc N'ab* v. *Robertson* [7] per Lords Davey

1. (1916) I L. R. 40 M. 58, 32 M. L. J 411.
2. (1917) I. L. R. 40 M. 886, 894 : 33 M. L. J. 144. (P. C.)
3. (1875) L. R. 10 Ch. A. 459, 462.
4. (1876) 2 C. P. 99, 107.
5. (1833) 5 B. and Adol. 1=110 E. R 692.
6. (1917) 33 M. L. J. 415, 420.
7. L. R. (1897) A. C. 129.

F. B.

Chinnappan Chetty v. The Secretary of State for India.

and Halsbury; Coulson and Forbes on Water courses, p. 77. Act III of 1905, creates at best a new right in the Government in standing or flowing water. But Act VII of 1865 refers to a 'river' and not to flowing water.

[*Coutts Trotter, J.*, referred to Murray's Oxford Dictionary for the meaning of the word 'river.']

The ownership of the river can only be determined with reference to ownership of the bed and banks. Act III of 1905 should not be construed so as to create by mere implication rights unknown to law. *Nairn* v. *The University of St. Andrews* [1]. Even if it is held to create a new kind ownership in standing water, it creates that right not only for Government but for private owners as well. But Act III of 1905 has been held to be merely declaratory of the pre-existing law. *Secretary of State* v. *Janakiramayya* [2], *Secretary of State* v. *Ambalavana Pandara Sannadhi* [3], *Sri Rajah Simhadri Raju* v. *Secretary of State* [4]. Reference was made at length to *Secretary of State* v. *Maharaja of Bobbili* [5], *Secretary of State* v. *Janakiramayya* [2], on appeal from *Secretary of State* v. *Janakiramayya* [6], *Venkataratnamma* v. *Secretary of State* [7], *Secretary of State* v. *Ambalavana Pandara Sannadhi* [8], *Kandukuri Mahalaxmamma* v. *The Secretary of State* [9], *Secretary of State* v. *Ambalavana Pandara Sannadhi* [10], *Prasada Row* v. *Secretary of State* [11].

The Government Pleader (V. Ramesam) for respondent :

The primary meaning of the term 'river' is a body of flowing water and that is the sense in which it is used in Act VII of 1865, Coulson and Forbes, p. 74; American Cyclopædia, vol. 34, p. 1792; Stroud's Judicial Dictionary; Bouvier's Law Dictionary, p. 933; *Kandukuri Mahalaxmamma* v. *Secretary of State* [9] citing *M' Nab* v. *Robertson*[12]. Act VII of1865 is concerned with water and has nothing to do with the bed or banks. The correspondence that preceded the passing of the Act is hardly relevant though detailed at length in the referring order. *Rajagopalacharyalu* v. *Secretary of State* [13]. Act III of 1905 can legitimately be utilised in the construction of Act VII of 1865. *Per curiam* in *Secretary of State* v. *Janakiramayya* [2]. The non-repetition of the word "of" before canals and water-courses and standing and flowing water, is significant having regard to its repetition

1. (1909) A. C 147.
2. (1915) 29 M. L. J 389, 397, 423.
3. (1917) 33 M. L. J. 415, 420.
4. (1914) I. L. R. 39 M. 67.
5. (1915) 30 M. L. J. 163.
6. (1913) I. L. R. 37 M. 322.
7. (1912) I. L. R. 37 M. 364 (f. n.)
8. (1912) I. L. R. 37 M 369 (f n.)=18 I. C. 264.
9. (1910) I. L. R. 34 M. 295
10. (1910) I. L. R. 34 M. 366.
11. (1917) I. L. R. 40 M. 886, 895
12. (1897) A. C. 129.
13. (1913) I L. R 38 M. 997, 1003.

F. B.
Chinnappan Chetty v. The Secretary of State for India.

twice in the earlier part of the section. This shows that the section deals with standing and flowing water as such, apart from the bed and declares the right of Government therein. In fact Bombay Act V of 1879 from which S. 2 of Madras Act III of 1905 is borrowed provides a penalty for the unauthorised use of water. In Madras, Act VII of 1865 had created the machinery for dealing with such a case and hence there was no necessity to repeat it in Act III of 1905. *Maharaja of Bobbili* v. *Secretary of State* [1]. There are two exceptions to S. 2 of Act III of 1905. The first takes away certain kinds of property from the body of the section and displaces Government ownership in them. The second does not negative the property of the Government but makes it subject to certain usufructuary right on the part of others. The section deals with several kinds of property and the exception to the section merely saves private ownership in such kinds of property as can be the subject of private ownership. But flowing water is not under the Common Law the subject of private ownership except in the case of a river flowing entirely within the limits of a person's land or except in cases where it is so vested by Statute in a person or corporation. *Embrey* v. *Owen* [2], *Medway Co.* v. *Earl of Romney* [3]. Riparian rights are distinct from the ownership of flowing water and do not involve the idea of such ownership. Such rights are based on vicinage or ownership of the banks and not on the ownership of the bed or soil. Easements Act, S. 7, Illn. (j), Coulson and Forbes, pp. 78-79; *Secretary of State* v. *Ambalavana Pandara Sannadhi* [4]. Riparian rights exist in tidal and navigable rivers though the bed belongs to the crown. Coulson and Forbes, p. 109. A riparian proprietor's property in the water commences only when he appropriates it.

[*Sadasiva Iyer, J.*—Can the owner of one bank of a river prevent a stranger from fishing in that half of the river adjacent to his bank.]

Yes. The fishing is an act of trespass for the owner of the bank is entitled to half the bed and to the space above that half. In this Presidency the Government have got certain special rights over the water of rivers independently of the right to the bed or banks. *Fischer* v. *Secretary of State* [5] approved by the Privy Council in *Prasad Row* v. *Secretary of State* [6]. The decision in *Kandukuri Mahalaxmamma* v. *Secretary of State* [7] was reversed by the Privy Council on the ground that there was a grant of

1. (1915) 30 M. L J. 163, 175-7.
2. (1851) 6 Ex. Rep. 353, 369.
3. 9 C. B. N. S. 575
4 (1917) 33 M. L. J. 415.
5. (1908) I. L.R. 32 M 141
6 (1917) I. L. R. 40 M. 886 (P. C.)
7. (1910) I. L. R. 34 M. 295.

F. B.

Chinnappan Chetty v. The Secretary of State for India.

the channel as part of an irrigation system. Reference was made to *Secretary of State* v. *Ambalavana Pandara Sannadhi* [1], *Venkataratnamma* v. *Secretary of State* [2].

T. R. Venkatarama Sastri in reply. The use of the word 'river' in collocation with tank, channel, etc., in Act VII of 1865 and the use of the word 'constructed' with reference to all of them, indicate that the expression has reference to the configuration of the body of water, including the bed, banks, etc., S. 2 of Act III of 1905 when it refers to ownership of a flowing water has reference to such ownership as is derived from the ownership of the land through which it flows. Otherwise the enumeration of the land-owners whose property in flowing water is left intact by S. 2 and the reference to other land owners in the last clause of Sub-S. (1) are meaningless. There is nothing in Act III of 1905 to show that the Legislature wanted to put an end to the valuable rights of riparian. proprietors and vest in the Government a new kind of ownership in flowing water. The reference to *Fischer* v. *Secretary of State* [3] is beside the point. It does not extinguish the rights of riparian owners. *Narasimha Sastrial* v. *Secretary of State* [4].

The Court expressed the following

Abdur Rahim, J.,

Opinion :—*Abdur Rahim, J.*—The question referred to us is whether a river called Marudarnathi which rising in hills belonging to the Government flows through ryotwari tracts, then through the Kannivadi Zamindari and again through a Government village can be said to be a river belonging to the Government within the meaning of S. I of the Madras Irrigation Cess Act, VII 1865, as amended by Act V of 1900. The question arose in connection with the right claimed by a pattadar of the Kannivadi Zamindari to take water from this river at a place within the limits of the Zamindari for irrigating Zamindari lands, without being liable to a separate cess levied under the above-mentioned Act. This Act enables the Government to levy a separate cess for "water supplied or used for purposes of irrigation from any river, stream, channel, tank or work belonging to or constructed by Government," subject to certain provisoes with which we are not concerned in this reference. It does not however purport to indicate the class of rivers or streams which were within the contemplation of the Legislature, but there is another Act of the Madras Legislature, the Madras Land Encroachment Act (Act III of 1905) on which

1. (1910) I. L. R. 34 M. 366. 2. (1912) I. L. R. 37 M. 364; S. C. 15 I. C. 594.
3. (1908) I. L R. 32 M. 141. 4. (1891) 1 M. L. J. 167.

* S. A. No. 252 of 1916. 7th November, 1918.

F. B.

Chinnappan Chetty v. The Secretary of State for India.

Abdur Rahim, J.,

considerable reliance has been placed in support of the contentions on behalf of the Secretary of State. It is enacted by its S. 2 (1) :—

"All public roads, streets, lanes and paths, the bridges, ditches, dikes and fences, on or beside the same, the bed of the sea and of harbours and creeks below high water mark, and of rivers, streams, nalas, lakes and tanks, and all canals and water-courses, and all standing and flowing water, and all lands, wherever situated, save in so far as the same are the property—

(*a*) of any Zemindar, poligar, mittadar, jagirdar, shrotriemdar or inamdar or any person claiming through or holding under any of them, or

(*b*) of any person paying shist, kattubadi, jodi, poruppu or quit-rent to any of the aforesaid persons, or

(*c*) of any person holding under ryotwari tenure, including that of a jenmi in Malabar, or of a wargdar in South Kanara, or in any way subject to the payment of land revenue direct to Government, or

(*d*) of any other registered holder of land in proprietary right, or

(*e*) of any other person holding land under grant from Government otherwise than by way of license,

and, as to lands, save also in so far as they are temple site or owned as house-site or backyard, are and are hereby declared to be the property of Government except as may be otherwise provided by any law for the time being in force, subject always to all rights of way and other public rights and to the natural and easement rights of other land owners, and to all customary rights legally subsisting."

Within the last eight years these enactments have been the subject of discussion in a number of cases, but the decisions are conflicting and do not supply a clear preponderance of opinion in support of one view of the law rather than another. In the first Urlam case, ***Kandukuri Mahalakshmamma Garu* v. *The Secretary of State for India*** [1]. Miller and Munro, JJ. ruled on the strength mainly of S. 2 of Act III of 1905 that the water of a stream or river belongs to the Government even though its bed or banks may belong to the Zamindar and that the Zamindar irrigating his land with such water is chargeable with a separate

1. (1910) I. L. R. 34 Mad. 295.

F. B.

Chinnappan Chetty v. The Secretary of State for India.

Abdur Rahim, J.

cess. Generally speaking this interpretation has been upheld by Oldfield, J. in *The Secretary of State for India* v. *Janakiramayya* [1] and was accepted apparently without further discussion by Arnold White, C. J. and Ayling, J. in *The Secretary of State for India* v. *Ambalavana Pandara Sannadhi* [2]. On the other hand Sankaran Nair, J. in *The Secretary of State for India* v. *Janakiramayya* [3], Sadasiva Aiyar and Bakewell JJ. in *The Secretary of State for India* v. *Janakiramayya* [1], the learned Chief Justice and Seshagiri Aiyar, J. in *The Secretary of State for India* v. *Maharaja of Bobbili* [4] and myself in *The Secretary of State for India* v. *Ambalavana Pandara Sannadhi* [5] have expressed a contrary opinion. The judgment of Miller and Munro, JJ. in the first Urlam case has since been reversed by the Judicial Committee of the Privy Council, (See. *Kandukuri Balasurya Prasadha Rao* v. *The Secretary of State for India* [6]), their Lordships holding that the Urlam Zamindar concerned in that case was protected by an engagement within the meaning of the proviso to S. I of Act VII of 1865. But Lord Parker who delivered the Board's judgment while indicating in the passage cited in the Order of Reference the problems that might arise upon the construction of the two statutes as to the rights of the Government in the rivers and streams of this Presidency refrained from expressing any opinion on the subject.

In construing the words ' river or stream belonging to Government ' in Act VII of 1865 it would be quite legitimate to take into consideration the state of the law in this connection as it existed at the time of the passing of the Act and we are also bound to give effect to any later statutory enactment by which the Legislature may have defined the river or stream which belongs to Government.

As regards the first, the learned Government Pleader at one part of his argument contended that S. 1 of Act III of 1905 was intended to clear away any doubt that might have been entertained as to the rights of the Government in the properties mentioned therein but he did not make any attempt to prove that the common law of the Presidency was in accordance with the interpretation which he sought to place on the

1. (1915) 29 M. L. J. 389.
2. (1910) I. L.R. 34 Mad. 366.
3. (1913) I.L.R. 37 M. 322.
4. (1915) 30 M. L. J. 163.
5. (1917) 33 M. L. J. 415=1917 M. W. N. 729.
6. (1917) I. L R. 40 M. 886=33 M. L. J. 144.

F. B

Chinnappan Chetty v. The Secretary of State for India.

Abdur Rahim, J.

enactment. In fact the materials available for forming a definite conclusion on the point are meagre and insufficient. In *Fischer* v. *The Secretary of State for India* [1] it was laid down that the Government has power by the customary law in India to regulate in the public interests the collection and distribution of water of rivers and streams flowing in natural channels provided they do not thereby inflict sensible injury on other riparian owners and diminish the supply they have hitherto utilised. This paramount right of the Government is held to be independent of the ownership of the bed of a river but for the purpose of exercising its control the Government would not be warranted in committing an act of trespass. It is not necessary for us to examine how far these propositions, beyond which it may be mentioned, the learned Government Pleader was apparently not in a position to carry the rights of the Government in so far as they were established by the rulings of this Court apart from any legislative enactment, are well founded. For it is obvious that the ruling in *Fischer* v. *The Secretary of State for India* [1] which is referred to by the Judicial Committee in *Kandukuri Balasurya Prasadha Row* v. *The Secretary of State for India,* [2] as showing that the law of the Madras Presidency as to rivers and streams is different in some respects from the English Law, does not affect the question before us. It cannot be said that a river or stream belongs to Government because it has the power in the public interests to regulate the distribution of its water, since it is clearly recognised that this right of the Government is not in any way in supercession of the rights of the riparian proprietors.

As to S. I of Act VII of 1865 a Full Bench of this Court in *The Secretary of State for India* v. *Mahadeva Sastrigal* [3], pointed out that it goes further than the preamble, enabling the Government to levy water-cess for use of waters derived from a natural stream belonging to the Government even though the Government might not have incurred any expenditure in connection therewith. This is now placed beyond any doubt by the judgment of the Privy Council in *Kandukuri Balasurya Prasadha Row* v. *The Secretary of State forIndia* [2]. Therefore

1. (1908) I. L. R. 32 Mad. 141, : 19 M. L. J. 131.
2. (1917) I. L. R. 40 Mad 886.
3 (1916) I. L R. 40 Mad. 58=32 M L J. 411 (F. B.)

F. B

Chinnappan Chetty v The Secretary of State for India.

Abdur Rahim, J.

even if Mr. Venkatarama Sastri is right in his contention that the word 'constructed' might be applied to "river or stream" as well as to "channel, tank or work" the power of the Government to levy cess clearly extends to natural streams belonging to the Government.

There has been much discussion as to what the words "river or stream" in Act VII of 1865 were intended to import, whether merely bodies of flowing water or whether also the bed and the banks as forming part of a river. Jessel, M. R. in *Taylor* v. *Corporation of St. Helens* [1] defines a stream of water as 'water which runs in a defined course so as to be capable of division' and "a water course" has been defined by Lord Tenterdon, C. J., in *Rex* v. *The Inhabitants of Oxfordshire* [2] as 'water flowing in a channel between banks more or less defined'. Lord Watson in *M'Nab* v. *Robertson* [3] says "the word 'stream' in its primary sense denotes a body of water having as such a body of continuous flow in one direction." Wensleydale's definition of a river is 'a running stream pent in on either side with walls' and banks.' But these definitions do not necessarily imply that the bed and the banks do not form part of a water-course (See Angell on Water Courses 30). Whether by a river or stream only the flowing water is intended or also the banks and the bed must depend on the context and the question therefore is, in what sense did the Legislature intend that a river or stream should be understood as "belonging to the Government" in S. I of Act VII of 1865.

In the absence of any indication to the contrary we must give to the expression a meaning and significance known to the law. When a river or stream rises and terminates entirely within the limits of any person's land that person is its owner in the fullest sense, just as much as he is the owner of the soil of his domain and of the trees growing thereon. If therefore any river runs in its entire course within Government land that river is undoubtedly within scope of the section.

But there is a qualified sense in which in law a natural stream flowing through the lands of a number of persons, each one of whom is entitled to use the water of the stream as it passes through his land as a natural advantage belonging to the

1, (1877) 6 Ch. D. 264. (C.A).

2. (1830) 1 B. and Ad. 289 at 301 : 109 E. R. 794. 3. (1897) A. C. 129.

F. B.

Chinnappan Chetty v. The Secretary of State for India.

Abdur Rahim, J.

land and as incidental to his right to the soil itself may be said to be the property of such persons collectively or individually. Lord Wensleydale in the following well known passage in *Chasemore* v. *Richards*, [1] observes "It has been now settled that the right to the enjoyment of a natural stream of water on the surface, *ex jure naturae*, belongs to the proprietor of the adjoining lands, as a natural incident to the right to the soil itself, and that he is entitled to the benefit of it, as he is to all the other natural advantages belonging to the land of which he is the owner. He has the right to have it come to him in its natural state, in flow, quantity and quality, and to go from him without obstruction ; upon the same principle that he is entitled to the support of his neighbour's soil for his own in its natural state." The same learned Judge as Baron Parke had laid down in *Embrey* v. *Owen* [2] : "The right to have the stream to flow in its natural state without diminution or alteration is an incident to the property through which it passes ; but flowing water is *publici juris*, not in the sense, that it is a *bonum vacans*, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only, that all may reasonably use it who have a right of access to it, that none can have any property in the water itself except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only : See 5 B and Ad. 24. But each proprietor of the adjacent land has the right to the usufruct of the stream which flows through it." Lord Selborne in *Lyon* v. *Fishmongers' Company* [3] after reviewing the above and other authorities points out that it is by reason of his ownership of the adjoining land that a riparian proprietor acquires the right to the usufruct of the water, for it is that which enables him to have access to the stream and to exclude others from it. The owner of land on the bank of a river is also presumed in law to be the owner of the bed opposite to his land *ad medium filum aquae*. We find therefore that learned Judges having in view the nature of the rights of a riparian proprietor in the water of a stream adjoining his land, have spoken of him as owner of the stream, such as, James, L. J. in *Bush* v. *Trowbridge Waterworks*

1. (1859) 7 H. L. Cases, 349 at 382. 2. (1851) 6 Exch. Rep. 353 at 369.
3. (1876) 1 A. C. 662.

F. B.

Chinnappan Chetty v. The Secretary of State for India.

Abdur Rahim, J.

Company. [1]; Cockburn, C. J., in *Stone* v. *Corporation of Yeovil,* [2]. Except in the above sense ownership cannot be predicated of a river any more in India than in England.

It is not the contention of the Government that riparian rights are not recognised by the law of this Presidency, or are substantially different here from those established in England except perhaps to the extent indicated in Fisher's case, (*Fisher* v. *The Secretary of State for India*) [3]. That very judgment takes the right of the riparian owners to be well recognised in this Presidency. The Legislature has also assumed the prevalence of such rights (See S. 7 illustration (h) of Easements Act V of 1882 and S. 3 of Act III of 1905 itself on which reliance is placed by the Government, not as taking away riparian rights but as conferring on the Government the power to levy cess for the use of waters of rivers and streams belonging to the Government), irrespective of such rights. Riparian rights are not unoften asserted and exercised by the Government itself in connection with ryotwari lands in which they claim proprietary rights analogous to those of a landlord.

Apart from such ownership as the possession of the banks of a river gives to a riparian proprietor I do not find that before the Urlam case the Government had even claimed any other form of proprietorship with respect to it or its waters. So far, therefore, it would seem that by 'a river or stream belonging to the Government' the Legislature *prima facie* intended in S. 1 of Act VII of 1865 to connote a Government ownership of the banks and the bed.

Has S. 2 of Act III of 1905 then conferred on the Madras Government a right of property in the water of a natural stream higher than, and different in its nature from, what the law recognises as incidental to riparian proprietorship? The history of the Act is well known. It was passed in consequence of a decision of this Court in *Madathapu Ramayya* v. *The Secretary of State for India,* [4] to legalise the practice of imposing what was known as penal assessment on lands claimed by the Government and which are encroached upon by a private individual. For that purpose S. 2 declares what shall be

1. (1875) L. R 10 Ch App. 459 at page 462.
2. (1876) L. R. 2 C. P. 99 at page 107.
3. (1908) I. L. R. 32 Mad. 141.
4. (1903) I. L R 27 Mad. 386.

F. B.

Chinnappan Chetty v. The Secretary of State for India.

Abdur Rahim, J.

deemed to be the property of the Government and the rest of the Act lays down the mode of levying assessment or ejecting trespassers from Government lands. To define the incidence of water cess is clearly not within the professed objects of the Act. At the same time if by S. 2 it has designated a class of rivers or streams as belonging to the Government, the Government will be entitled to levy cess for the use of such waters under the Irrigation Cess Act. S. 2 of the Act, the language of which appears to have been borrowed from the Bombay Act V of 1879, cannot be said to be very happily worded. It is undoubtedly a wide and sweeping enactment, for there can be no question that so far as lands are concerned including those covered with water, it declares such of them as are not the property of any of the various classes of land-owners in the Presidency to be the property of the Government. At the same time every endeavour is made to make it clear that the Legislature did not by this enactment mean to deprive any private individual of his property or of any rights connected with immoveable property.

The contention on behalf of the Government based on this Act may perhaps be best expressed in the language of Miller, J., in the following passage in *Kandukuri Mahalakshmamma Garu* v. *The Secretary of State for India,* [1] " So far as this case is concerned the provisions of S. 2 amount to a declaration, that, subject to easement and natural rights of other land-holders, all standing and flowing waters which are not the property of any one else are the property of the Government. Now clearly the waters of the Vamsadhara river do not belong to any one else ; the owners of land on the banks of the river do not own the water : their natural rights as defined by the Easements Act is saved by Act III of 1905, but it is not contended that the water is their 'property'. It follows that it is the property of the Government.

And if the body of the water forming the river is the property of the Government, the river, it seems to me, belongs to the Government within the meaning of Act VII of 1865, even though the bed may be vested in the owners of land along the banks, so as to give them the right to accretions or 'lankas'

1. (1910) I. L. R 34 Mad, 295 at page 303.

F. B.

Chinnappan Chetty v. The Secretary of State for India.

Abdur Rahim, J.

forming therein. The Vamsadhara river is undoubtedly a natural stream, and the definition of a natural stream given in the explanation to S. 7 of the Easements Act indicates that in the eye of the law the stream is the flowing body of water—and a stream was defined by Lord Watson in *M'Nab* v. *Robertson* [1] as "a body of water having as such body a continuous flow in one direction."

If this interpretation be correct we must give effect to it even though the natural or prescriptive rights of riparian owners would as stated by Lord Parker be seriously diminished by the Act and where the Government have not expended money in improving the natural stream, apparently without any sort of *quid pro quo*.

In the first place it must be pointed out, though it hardly affects the question under consideration, that S. 2 cannot properly be said, as has sometimes been assumed, to have made any change in the ordinary rules regarding burden of proof for I find nothing in it which necessarily implies that whenever the Government lays claim to any land or water it lies upon the party against whom the claim is made to show that the property belongs to him quite apart from other considerations regulating the onus of proof as dealt with in the Evidence Act. Then, whether a body of flowing water can be said to be the property of the owner of the land by which the stream flows depends on the meaning to be attached to the word 'property' as used in this section. According to the Common Law of England running water, strictly speaking, cannot be the property of any one except by statutory enactment. But a riparian proprietor, as I have stated, is in a qualified sense the owner of the stream adjoining his land. S. 2 itself proceeds on that assumption; otherwise there would have been no need to enumerate the land-owners whose property in a water-course and in flowing water among other things is left intact. Now it would be a violation of the ordinary rules of interpretation to hold that when 'flowing water' is declared by S. 2 to be the property of the Government save in so far as it is not the property of a Zemindar or other land-owner that the proprietorship in contemplation in the two cases was intended to be of a different character. That the rights of

1. (1897) A. C. 129.

F. B.

Chinnappan Chetty v. The Secretary of State for India.

Abdur Rahim, J.

the Government in water, declared by this section are in connection with its position as a land-owner may also well be deduced from the use of the words "other land-owners" in the saving clause. Rights in water are incidental to the ownership of the land by which it flows or on which it stands so that by the conveyance of a parcel of land the rights in the water covering any portion of it will pass. This is the law not only in England but so far as I am aware in India as well. If it was the intention of the Madras Legislature to confer on the Government new rights in flowing water of a nature hitherto unknown to the general law either of India or England and which would materially diminish, if not practically destroy, extensive and valuable vested rights of riparian proprietors in this Presidency, one would have expected them to carry out such intention by a more direct and lucid process than by the introduction of certain general words capable of more than one construction in a Statute dealing with a wholly different subject. In my opinion when the Legislature says that all 'flowing water' in the Madras Presidency is the property of the Government save in so far as it is the property of a Zemindar or any other land-owner it means only to declare with respect to flowing water passing through the lands of Government as well as of a Zemindar that the Government has in them rights of the same kind as the Zemindar himself as a riparian owner enjoys under the ordinary law and not rights of a higher character materially impairing it not altogether superceding the landowner's rights.

The conclusion that I come to is, that where, as in the case in which the question under reference has arisen, both the banks and the bed of a river at the place at which water is taken by the Zamindar do not belong to the Government, the river cannot be said to belong to the Government for purposes of S. 1 of Act VII of 1865. The answer to the question referred will therefore be given in the negative.

Ayling, J.

Alying, J.—I agree that the answer must be in the negative.

The main authority in support of the position contended for by the learned Government Pleader is the judgment of Miller, J., (concurred in by Munro, J.) in *Kandukuri Maha Lakshmamma Garu* v. *The Secretary of State for India* [1]. This ruling was

1. (1910) I. L. R. 34 Mad. 295.

F. B.

Chinnappan Chetty
v.
The Secretary of State for India.

Ayling, J.

quoted without comment or discussion by the late Chief Justice and myself in a case which came up for disposal very shortly afterwards, (*The Secretary of State for India* v. *Ambalavana Pandara Sanadhi* [1] and relied on as one of two alternative grounds for our decision therein. We must, no doubt, be taken to have followed it : though the report of the case does not show, and my memory does not enable me to say, whether any attempt was made to question the correctness of the ruling. However that may be, sitting as a member of a Full Bench, on which the ruling is not binding and after hearing a full argument on the point, I can only come to the conclusion that the learned Judge's application of S. 2 of Act III of 1905 is one from which I should respectfully dissent.

There was considerable discussion before us as to the meaning to be attached to the word "river" in S. 1 of Madras. Act VII of 1865, whether as including the bed, banks and water, or only the water flowing down the river bed, I do not think it makes any practical difference in the present connection, and the choice of meaning must always depend mainly on the context. In construing S. I, I should be inclined to interpret the word "river" as including both the bed and banks as well as the water : and I think the close juxtaposition of the term "work" in the same clause tends strongly to support this view. But whichever meaning be given seems to me to make little difference. The bed and banks are found as a fact to belong to the Zamindar : and I agree with the opinion expressed by the learned Chief Justice in his Order of Reference that for the purpose of construing Act VII of 1865, the ownership of the water or a river must follow the ownership of the bed and banks. In fact, no authority has been cited, nor so far as I can see, no argument has been seriously addressed to us for the proposition that, apart from the effect of Madras Act III of 1905, the water of the river while flowing through Zemindari limits was the property of Government. Some reference was made to Fischer's case (*Fischer* v. *The Secretary of State for India* [2]), but this contains nothing to support it. What has been contended is that it was the property of no one, relying on the doctrine of English Law expressed in 28 Halsbury, Paragraph 649, that flowing water cannot be the subject of

1. (1910) I. L. R. 34 Mad. 366. 2. (1908) I. L. R. 32 Mad. 141.

F. B.

Chinnappan Chetty v. The Secretary of State for India.

Ayling, J.

property. Construing the term "property" in the most complete and absolute sense, this, of course, commands assent. It is not suggested in the present case for instance that the Zemindar could pursue the drops of water after they had flowed out of the territorial limits of his Zamindari and claim them as his own. But as long as they are flowing within his Zamindari, they may be his and, I think, are his, in a very real and valuable sense whether we call his property usufructuary or use any other word. And this kind of ownership of flowing water is recognised in the clearest manner in the judgments of English Courts. *Vide* James, L. J., in *Bush* v. *Trowbridge Waterworks Co.* [1], to which may be added *Stone* v. *Corporation of Yeovil*, [2]. This seems to me sufficient legal authority for what I should be inclined to hold on grounds of common sense and equity that the owner of the bed and banks of a river is also the owner (though in a special and qualified sense) of the flowing water, so long as it passes between those banks and over that bed; and that the term 'property' may not be inaptly applied to such ownership.

Now Act III of 1905 declares that flowing water (*inter-alia*) is the property of Government "save in so far as it is the property" (so far as we are here concerned) "of the Zemindar." If at the time of passing of the Act, it was already the property of the Zemindar the Act makes no difference : and the contention put forward for Government and accepted in *Kandukuri Mahalakshmamma Garu* v. *The Secretary of State for India* [3] is simply that because the Zamindar's property in the flowing water is not absolute, it should be treated as a nullity, and the saving clause held inapplicable. I cannot accept this. It is not seriously suggested that this Act operated to confiscate existing private rights, and, in my opinion, it was not intended to. In so far as the river, whether in the broader or narrower sense, was the property of the zamindar before the passing of the Act it remained his property afterwards : and before the Act, his rights to use flowing water and prevent others from using it were certainly such as to make it impossible to call it the property of Government.

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1. (1875) L. R. 10 Ch. Ap. 459
2. (1876) L. R. 2 C. P. 99.
3. (1910) I. L. R. 34. Mad. 295.

F. B.

Chinnappan Chetty v. The Secretary of State for India.

In my view therefore the enactment of Act III of 1905 does not affect the present case, and apart from its operation, the decision can only be against the ownership of the river by the Government.

Oldfield, J.

Oldfield, J.—The question whether S. 2 of Act III of 1905 involves any declaration regarding the burden of proof of the right to water or of its ownership does not arise directly in this case and I therefore think it unnecessary to express any opinion regarding the portion of the judgment of Abdur Rahim, J., in which it is considered. With this reservation I concur in th judgments just delivered and in a negative answer to the question referred.

Sadasiva Aiyar, J.

Sadasiva Aiyar, J.—In the course of my judgment in the case in *The Secretary of State for India* v. *Janakiramayya,*[1] the following remarks occur at page 419. 'There were some arguments advanced at the Bar on the question whether words "river", "stream", "channel", and "tank" found in S. I (a) of the Madras Act VII of 1865 meant (1) the beds, banks and the volume of waters (all taken together) of and in the river, stream channel or tank, (2) or whether it meant the bed alone or bed and banks alone of the river, stream, channel or tank or (3) whether it meant only the collection of the waters in the river, stream, channel or tank. I think clause (b) of S. (1) of that Act which speaks of "water *from* any such river stream channel or tank" clearly indicates that the words "river, stream etc.," are used in the sense of the collective body of waters which are called river, stream, channel or tank according to the respective configurations of the receptacles'. After the full arguments I have heard in the case, I feel confirmed in my view that the primary meanings of the words "river" and "stream" connote the collection of waters and exclude the bed and banks. I do not deny that by a justifiable use of words (called Jahath Latchana Vritti in Sanskrit), the words may be made to mean the bed alone or one bank alone or both banks to the exclusion of the body of water (as when we say a village on the Ganges). But the ordinary and primary meaning is clearly the collection of waters (instance—the usual expressions "water of or *from* a stream or river", "bed of a river", "banks of a river", "bathing in the river", "the river is muddy" and so on). Especially the

1, (1915) 29 M. L. J. 389,

F. B
Chinnappan Chetty v. The Secretary of State for India.
Sadasiva Aiyar, J.

word "stream" from its very root meaning primarily connotes the body of water flowing in a current and in Sanskrit also, the primary meaning of a river is the "Jala Pravaham". In Murray's Dictionary, the primary meaning of the word "river" is given as "a copious stream of water, etc."

At page 423 of the same judgment, I said with reference to the Madras Act III of 1905 : "There can be no doubt that the Government starts with a strong presumption in their favour under Madras Act III of 1905, that all standing and flowing waters belong to them, but it is rebuttable presumption." S. 2 of the Act says that "all standing and flowing waters" (save in so far as the same are the property of others) "are hereby declared to be the property of Government". On this language I am still of opinion that the Legislature intended that when a dispute arises between Government and a private person, the burden should rest on the latter of proving that a particular water belongs to him, though of course proof by him (or admission by Government) of present use and possession will easily shift the burden on to Government. I do not think it necessary to consider at length the argument that the language of S. 2 grammatically considered does not make all standing and flowing water itself the property of Government but only the bed of all standing and flowing water. In my opinion the language could not bear such construction and the matter seems to be concluded by the following sentence in the judgment of their Lordships of the Privy Council in *Kandukuri Balasurya Prasadha Rao* v. *The Secretary of State for India* [1] "Further the Madras Act III of 1905 appears to enact that (*inter alia*) all standing and flowing water not the property of private individuals is the property of Government but subject to the natural and easement rights of other land-holders."

In *The Secretary of State for India* v. *Janakiramayya* [2], I said 'In this connection, I wish to point out that not only all "standing and flowing water" wherever situate are and are declared to be the property of Government, but the words just coming after the words "all flowing and standing water" in S. 2 (1) of Act III of 1905 are "*all lands wherever situated.*" Thus as regards all lands also wherever situate,

1. (1917) I. L. R 40 Mad. 886, 895. 2. (1915) 29 M. L. J. 421 and 425.

F. B.

Chinnappan Chetty v. The Secretary of State for India.

Sadasiva Aiyar, J

the presumption is created by that section that they belong to Government unless proved to belong to Zamindars, Inamdars, etc. As regards standing water in tanks, can it be reasonably argued that the ownership of the tank bed has nothing to do with the ownership of the water standing on it ? 'Can it be said that even though the rain water fills the tank, the standing water in it is the property of Government?' 'The section again assumes that Zamindars, Poligars, Inamdars, etc., can have the same kind of "property" or ownership in standing and flowing waters as Government is declared to possess'. 'That flowing water *by its very nature* can never be the absolute property of the Government or any body else (though the ownership in a very real sense can be predicated of it as vesting in a person so long as the water continues to be situated vertically over land belonging to that person) is clear to my mind ; and when S. 2 (1) says that all standing and flowing water are hereby declared to be the property of Governments (except as may be otherwise provided for by any law for the time being in force, subject always to all public rights and natural and easement rights of other land-owners and to all customary rights) it seems to me that the Legislature did not intend to give to the Government greater rights of ownership in flowing water than the principles of general jurisprudence would allow. * * * When water flows in a river over the bed-portion belonging to one owner, that water is temporarily and usufructuarily his property (subject to well known natural rights of others). As soon as it leaves that portion of the bed and begins to flow over another bed-portion belonging to another owner, the water becomes the property of the owner of that bed portion, subject again to the same rights. * * I can find nothing in S. 2 of the Madras Act III of 1905 which was intended to give the Government greater rights over standing or flowing water vertically over their land than any other proprietor of land (like a Zamindar or Inamdar) has over water standing or flowing over his'. At pages 427 and 428 I said : There are two well known legal maxims which usually come to mind in such cases. One is *Acqua currit et debet currere ut currere solebat* which signifies that water flows and ought to flow as it used to flow. Grounding on this maxim, it is usually stated that there is no property in running water, but merely a right to use it, and this right may only be exercised so as not to

F. B.

Chinnappan Chetty v. The Secretary of State for India.

Sadasiva Aiyar, J.

interfere with the use of the water by other persons similarly entitled. But the right to use it can itself be called "property" in running water, and (as I have said already) it is not wise to confuse ourselves by juggling with the word "property," or the word "owner"?

The other maxim is *cujus est solum, etc.,* meaning that whoever is the owner of the soil, it is his even to the firmament and to the middle of the earth. This maxim is the basis of the rule that waters in ponds, tanks, and wells situated on land owned by a person belong to him in a very real sense, and that in the flowing water also running over his land, he has got a real right of property though of a qualified kind. * * How else is a Zamindar or Inamdar to prove his "property" in "standing or flowing water" except by proving his "property" in the land situated under such water it being clear from S. 2 (1) (a) itself that such "property" can exist in him? *Narasimha Sastrial* v. *The Secretary of State for India* [1].

'There is, no doubt, a distinction in the extent of the proprietary or ownership rights of a man in water over his soil, according as the water is standing water (as in a tank) or water naturally flowing as a river (though the waters cannot be said to belong to anybody else so long as the waters are still vertically over his soil).' (The existence in a man of a very real proprietary right over even flowing water within the limits of that portion of the river-bed which belongs to him is well brought out by his power to prevent other persons fishing in that portion of the current of floating over or doing any acts in that portion of the flowing water and he can effectually exercise that power by driving stakes in the river-bed from bank to bank or drawing nets across, without interfering of course with the flow of the water down the river.)

I am confirmed in the opinions quoted above by the referring Judgment of my Lord the Chief Justice in this case, and by the opinion of Ayling, J. just delivered. In *Kandukuri Balasurya Prasadha Row* v. *The Secretary of State for India* [2] their Lordships of the Privy Council state that if S. 2 of the Madras Act III of 1905 be relied on for the contention that the water of a stream belongs to Government even when the property in the bed belongs to a riparian owner, "the natural

1. (1891) 1 M. L. J. 167. 2. (1917) I. L. R. 40 Mad. 895.

F. B.

Chinnappan Chetty v. The Secretary of State for India.

Sadasiva Aiyar, J.

and prescriptive rights of riparian owners are seriously diminished by the Act and where the Government have not expended money in improving the natural stream, apparently without any sort of *quid pro quo*." I think from this sentence, a clear indication is given as to the inclination of the minds of their Lordships of the Privy Council. Their Lordships (it seems to me) suggest that the words " property of Government" in the Madras Act III of 1905 should not be given as wide a meaning as is connoted by the words " belonging to Government" in the Madras Act VII of 1865, as such a construction would lead to startling and inequitable results.

For the above reasons I agree in answering the question referred to us in the negative.

Coutts Trotter, J.

Coutts Trotter, J :—The short contention for Government is that the Act of 1905 created a property in Government in all flowing water in this Presidency, without reference to any question of ownership of the banks or bed of the river.

English lawyers do not ordinarily regard flowing water as the subject of property. The owners of land on the banks of the river are owners of the soil of the river-bed *usque ad medium filum aquae* ; and by virtue of the ownership of that land, they acquire certain rights over the water flowing past the banks which they own. Those rights are known both to English and Indian law as riparian rights ; and they arise as an incident of the land through which the water passes. When Judges are using scrupulously accurate language, they are careful to point out that neither riparian owners nor others have any property in the water (*e.g.*, *Embrey* v. *Owen* [1]). But the rights of a riparian owner are extensive, and it is very natural that they should often be described as rights of property or ownership, the necessary qualification that the 'property' is only usufructuary being left unexpressed, see *e.g.*, James, L. J. in ***Bush*** v. *Trowbridge Waterworks Co.* [2]. Statutes sometimes use similar language ; *e.g.*, S. VI of the Water-Works Clauses Act, 1847. It is especially natural when the ownership of both banks is vested in the same person to speak of him generally as the owner of the river.

The material portion of Act III of 1905 in effect declares that all flowing water save and in so far as it is the property of

1. (1851) 6 Exch. Rep. 353. 2. (1875) L. R. 10 Ch. App. 459 at page 462.

F. B.

Chinnappan Chetty v. The Secretary of State for India.

Coutts Trotter, J.

any one else is henceforth to be the property of Government. What the judges did in the Urlam case, *Kandukuri Mahalakshmamma Garu* v. *The Secretary of State for India* [1] was to apply the English Common Law conception to the saving clause, with the result that they held that no one had any property in flowing water, except perhaps in the abnormal case of a river which from source to mouth runs through one man's land. The result was that all flowing water would become automatically the property of Government. That is in itself a startling conclusion ; but it involves a still more startling process. We are to suppose that the draftsman and the enactors of this short local act designed, not directly but by mere intendment, to introduce a wholly new juridical conception, *viz.*, that of property in flowing water without reference to any question of ownership of the banks or bed of the river in which it flows. That seems to me obnoxious to all the evils pointed out by the House of Lords in *the St. Andrew's Case*: *Nairn* v. *The University of St. Andrew's* [2]. In my opinion *the Urlam case* was wrongly decided, and I think the Act of 1905 when it spoke of water 'belonging' to any one, only used the term in the lax but commonly understood sense of water over which rights were exercised by virtue of ownership of bed or banks. This construction necessitates no new legal conception of property in water ; for flowing water will only go to Government as a *bonum vacans*, when the bank or banks are *bona vacantia*, and it will become their property only in the sense with which every one is familiar and which is correlated to their property in the banks or bed.

Some attempt was made during the argument to draw conclusions from the linguistic implications of the word 'river.' I do not think such considerations go far much, but they certainly do not help the case of Government. 'River' is not derived from the Latin '*rivus*,' as most people would suppose off-hand, but through the French *riviere* from 'riparia,' *i.e.*, the thing with banks (ripa). Nor would the case be better if the derivation was from *rivus*, for I find this in the Digest (43—21) : *rivus est locus per longitudinem depressus, quo aqua decurrat.*

A. V. V.

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1. (1910) I. L. R 34 Mad. 295.   2. (1909) A. C. 147.

PRIVY COUNCIL.

PRESENT :—LORD PHILLIMORE, SIR JOHN EDGE AND SIR LAWRENCE JENKINS.

[On appeal from The Chief Court of Lower Burma.]

P. C

Joseph v. Shew Bux.

A. V. Joseph ... *Plaintiff* Appellant.*

v.

R. Shew Bux ... *Defendant—Respondent.*

Damages—Proof of damages—Extent of evidence required—Indefiniteness of evidence, no ground for awarding nominal damages only.

The difficulty of estimating damages is no ground for refusing to fix them, or for giving nominal damages only. If the party whose duty it is to prove damages does not give the best evidence, every presumption should be made against him: if there is any range, the range should be taken against him: but this does not relieve the Court altogether of the duty of assessing the damages as best it can on evidence and materials actually before it.

Appeal from a decree of the Chief Court of Lower Burma, dated March 6, 1916, reversing a decree of Young, J.

The facts of the case are sufficiently stated in their Lordships' judgment. Young, J. held that plaintiff's title to any damages at all was dependent on his proving that the sale by auction which he held in consequence of defendant's refusal to pay for the goods, was genuine, and that he had not done so: Young, J., therefore dismissed the suit. On appeal, Fox, C. J., and Twomey, J. held that there was no reason to doubt the genuineness of the auction sale, but that plaintiff had not given sufficient proof of damages. They therefore gave him a decree for one rupee only as nominal damages, without costs. The material portion of Fox, C. J's. judgment in which Twomey, J., concurred is as follows:—

"Another question however is whether the plaintiff firm produced proper and sufficient evidence to show what the cost of shipping, freight, insurance and other charges would have been to him if the goods had been shipped, so as to find out what his loss had actually been. There was no evidence of what the cost of getting 507 tons of sleepers from his yard on to a steamer would have been. The plaintiff's manager said that the rate of Rs. 16-8-0 per ton was the prevailing rate of freight from Rangoon to Bombay in October and November 1914. In view of the statement in the plaintiff's letter of the 22nd September (Exhibit Z) to the effect that the rate was then about Rs. 28 per ton, the statement verges on the absurd. The prevailing rate could have been and should have been proved by the evidence of either freight brokers or persons in the employ of shipping agencies.

* 8th November, 1918.

P. C.

Joseph v. Shew Bux.

The cost of insurance was not allowed for at all in the plaintiff's claim, and no evidence was given as to what it would have been in October or November 1914. It was not for the Court to speculate as to what it probably was. The plaintiff was bound to call evidence as to it on which the Court could rely.

Instead of speculating as to the auction charges, these should have been according to the auctioneer's account sale, Exhibit 2 X. There was no justification for the insertion of the claim for interest. On the whole the plaintiff in my opinion failed to furnish sufficient reliable data for estimating the amount of damages which should be awarded to him. Judging by what was done in *E. Clemens Horst Company* v. *Biddell Brothers* [1] in regard to the defendant's counter claim as to which he did not produce evidence on which the court could act, it appears to me that the suit should not have been dismissed, but the plaintiff should have been given a decree for nominal damages without costs.

I would accordingly set aside the decree of the Original Court and give the Plaintiff a decree for Rupee one as damages without costs. I would order each party to bear his own costs of this appeal."

Hence this appeal.

Newbolt, K. C. and Gerard Sanders for appellant: The Appellate Bench of the Chief Court have taken a wrong view of *E. Clemens Horst Co.* v *Biddell Brothers* [1]. The judgment in that case proceeded on facts and not on law. Fox, C. J., has overlooked S. 50 of the Sale of Goods Act; the section which provides that the seller may maintain an action for damages for non-acceptance when the buyer wrongfully refuses to accept and pay for the goods, and especially Sub-S. 3. In *Clemens Horst* v. *Biddell Brothers* [1] there was no available market, so the sub-section applicable was (2): and naturally some one had to be called to prove there was a loss; failing this, nominal damages of one shilling was given. Here there is "an available market" and the measure of damages is regulated by Sub-S. (3).

The Courts have always held that the difficulty of estimating damages is no reason for refusing to fix them: *Reigate* v. *Union Manufacturing Co.* [2] a case of an extraordinarily complicated and difficult claim.

(*Lord Phillimore.*—Damages could be proved here to the nth degree. I think plaintiff has got to do it: you may think he has done it.)

Roper v. *Johnson* [3], has never been doubted.

1. (1911) 1 K. B. 214; (S. C) (1911) 1 K B. 934 (C. A.); (S. C.) (1912) A. C. 18.
2. (1918) 1 K. B. 592 (C. A.) at pp. 596, 607.
3. (1873) L R. 8 C. P. 16.

P. C.
Joseph
v.
Shew Bux.

Gregory K. C. and Gurdon for respondent :—The Appellate Bench are right. Plaintiff had given no reliable evidence as to the costs of freight and insurance and it was not for them to speculate. My submission is that it was for plaintiff to prove his case. On the evidence the freight might have been anything.

(*Lord Phillimore.*—But the maximum would be Rs. 28). Not so: he must prove it. The letter in which it is said it might go to Rs. 28 was in September : in November it might have been more.

(*Lord Phillimore.*—But anyone can see there are outside limits : we must not reject the whole of his claim because he has not given all the evidence possible.)

The material date was November 1914: Plaintiff has given no evidence at all from which can be inferred the freight in that month. So with insurance: the only evidence is what the insurance was on some shipment in February 1915. All he had to do was to call some ship broker to say what the prevailing rate was.

He asks now for an enquiry as to damages, but he never asked for it before.

(*Lord Phillimore.*—You never seem to have suggested to him that his damages were wiped out by freight and insurance.)

If the Court has not the materials before it, is it entitled to speculate ?

Lord Phillimore.—Juries do every day.

Sir John Edge.—They would do it, probably, anyhow: but they wouldn't be told to do it.

Lord Phillimore.—I don't know. They would be told the facts and asked to form the best opinion they could.

Plaintiff has to prove his special damage definitely.

(*Lord Phillimore.*—I am not so sure about definitely, he can say his damages are round about so and so.)

Plaintiff was very nearly contumacious: he was challenged to prove his damages, and did not do it.

Gurdon followed.—Plaintiff had the auctioneer's bills where he overcharged for auctioneer's fees. His main witness contradicts himself as to freights, etc.: Young, J., may have disbelieved him altogether.

No reply was called for.

Their Lordships' judgment was delivered by

Lord
Phillimore.

Lord Phillimore.—This is an appeal from a decree of the Chief Court of Lower Burma, reversing the decision of the learned Judge sitting on the Original Side of that Court.

The action was brought for damages for not taking delivery of a quantity of sleepers. The defendant disputed the breach ;

P. C.

Joseph v. Shew Bux.

Lord Phillimore.

disputed the regularity of the contractual process necessary for the assessment of damages, and disputed that there were any damages. Both Courts have found that there was a breach, and their Lordships do not think it necessary to go further into that matter.

With regard to the contractual assessment of damages, that was to be fixed in a particular manner :—

"It is also agreed that in case the said Shew Bux Baboo fails to take delivery of the timber in time the said A. V. Joseph & Co. will dispose of locally, and the said Shew Bux Baboo will pay the difference in price what the said Company may have suffered.

In fact, Joseph & Co., put this property up for auction in an apparently regular manner ; there was an auctioneer employed; it was advertised ; and, at the request of the defendants, the auction was postponed, and then held. Very few purchasers came forward ; they were not people of much importance, and it is possible, as was shrewdly suspected, that in the end, Joseph & Co., may have bought back a good deal of what was sold. It was no fault of theirs that the auction was not better attended, and it may very well be that if they took such a step, which is only a matter of suspicion, and not of proof, they assisted the defendants, because the goods might have been "slaughtered" if they had not intervened, or procured people to intervene.

The learned Judge in the Court of first instance took an unduly suspicious view of the conduct of Joseph & Co., and said it was their duty to disprove a shadowy charge of fraud, and that they had not disproved it, a very unusual method of procedure. The Chief Court on appeal set that right and agreed that Joseph had taken the right course to estimate the damage. But the learned Judges in that Court came to the conclusion that Joseph, the present appellant, the plaintiff, had not proved his damage sufficiently. Now what he had got to do was this : This was a c.i.f. contract with this peculiarity, that the money was to be paid as the goods were inspected and before they were put on board. Therefore, Joseph had, for his money, still to provide tonnage and pay freight and pay the insurance ; and, when he comes to estimate his loss, he has, first of all, on the one side to put the contract price of the amount of timber in question, which was 507 tons, then to add to it the expenses of the auction, then to deduct from

P. C.

Joseph
v
Shew Bux.

Lord
Phillimore.

it what was realised at the auction, and also to deduct from it his necessary expenditure in completing his bargain, which really comes under four heads: the freight, which was the biggest thing; the insurance; the loading charge, and certain port or Customs duties. No doubt he was bound to give some evidence as to what those figures were, and no doubt he did give somewhat shadowy evidence: he said that the freight less rebate was 16 rupees 8 annas per ton. He was faced with a letter in which he threatened, during the course of the discussion between the parties, the other parties with the penalties which would ensue if they did not take delivery, and in which he, apparently, asserted that freight would run up to the rate of 28 rupees; and he was cross-examined as to whether he had not taken rates in April, 1914, and whether these rates might not have gone up; and one of his witnesses said they might have gone up in September or October. He gave evidence as to the loading; he gave evidence as to the Customs duty. And as to the insurance, he gave evidence that the total combined ordinary maritime risk and war risk—it being questionable whether he would have to pay the war risk—came, in the following February, to 10/16ths per cent., and, in a general way, he implied that this was the rate of insurance which he thought was due at the time. The evidence was not of the very best, and every presumption should be made against him; if there is any range, the range should be taken against him; but the defendant called no evidence on these points at all, and the Board is entirely without trace of any suggestion on the defendant's behalf that these expenses would have wiped out the otherwise apparent great loss. Nevertheless, the Chief Court on appeal, after having decided in favour of the plaintiff to the effect that there was a breach and that he had taken the proper steps to have the breach measured, came to the conclusion that he had not given sufficient evidence to show the cost; that he had made one or two small misstatements as regards some of his expenses; and that, on the authority of a case, which their Lordships think the learned Judges somewhat misread, or, at any rate, misapplied, he could get nothing but nominal damages. Really that would be a very serious thing to hold. Without making the deductions for freight, loading, customs and insurance, if you simply take the gross cost, and

P. C.

Joseph v. Shew Bux.

Lord Phillimore.

deduct from it the sale price, here is a sum of 33,000 rupees, and to show that that is to be reduced to 1 rupee, the Court would have to be satisfied that the freight and the other minor charges would come to an approximately equal figure. It is quite obvious in the case, both on the evidence given and, what this Board very much relies on, the way the case was conducted in the Court of first instance, that no such case was intended to be made.

Accordingly their Lordships have come to the conclusion that there must be a very substantial verdict for the plaintiff. There is an element of uncertainty which might have made it desirable that this matter should be sent back for enquiry, but neither counsel has pressed for that, and, their Lordships think, very wisely, because the amount that could be taken off on a possible enquiry would bear a very small proportion to the expenses of such an enquiry.

Therefore their Lordships, without dissent of Counsel, have taken the matter into their own hands; and it is enough to say that they have, of course, reduced the minor claims in respect of the auction expenses to the figure at which they stand in the bill which is annexed to the statement of claim, instead of the figures which were incorrectly stated in the statement of claim.

The original contract price and the sale price are fixed figures. The loading and the Customs, two small items, have been, in their Lordships' opinion, proved. The insurance, their Lordships think, can be safely taken at 10/16ths per cent., without their Lordships deciding whether or not the plaintiff is responsible for the war risk (which, on a c.i.f. contract, is by no means necessarily the case), as the Counsel for the appellant has consented to have that taken against him.

Then that leaves the one large item, the freight. As regards the freight, it is possible that plaintiff will suffer owing to his carelessness, but their Lordships think the safe thing to do is to take it at the largest figure which has been suggested here, namely, that figure which he threatened the other side with in the letter to which their Lordships have referred. That would be at the rate of 28 rupees, or, with a deduction of 1 rupee rebate, 27 rupees. Making those deductions, their Lordships bring out the figure of damages at 18,502 rupees, and,

P. C.

Joseph v. Shew Bux.

Lord Phillimore.

that, in their Lordships' opinion, is the sum for which judgment should be entered.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be allowed ; that the decree of 1 rupee as damages should be converted into a decree for 18,502 rupees, and that the plaintiff, who has won all through, should have his costs below and of this appeal.

Solicitors for Appellants :—*Bramall and White.*

Solicitors for Respondents :—*Arnold and Sons.*

A. P. P.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SESHAGIRI AIYAR AND MR. JUSTICE PHILLIPS.

Sarvothama Row ... *Appellant** (*Defendant*).

v.

Chinnasami Pillai and others ... *Respondents* (*Plaintiffs*).

Sarvothama Row v. Chinnasami Pillai.

Limitation Act, Art 115—Applicability—Hindu Law—Joint Family (Mitakshara—Sale of family properties by manager—Subsequent sale by junior member of his share therein—Obstruction by prior purchaser to subsequent purchaser taking possession—Litigation by latter for recovery of property purchased ending unfavourably—Suit by him thereafter for recovery of sale price and of expenses of litigation—Maintainability—Limitation—Cause of action—Right to expenses of review petition.

A, the purchaser from a junior member of his share in joint family properties, attempted to take possession thereof, but was resisted by a prior purchaser of those properties from the manager of the family. A then instituted a suit for the recovery of the share purchased by him and the litigation was carried up to the High Court whose decision was against him. A petition filed by him for a review of the judgment of the High Court was also dismissed within 3 years of the date of the judgment of the High Court but more than 3 years after the date on which he was refused, A instituted a suit for the recovery of the sale price and of the costs incurred in the unsuccessful litigation. *Held*, (1) that the suit was not barred by limitation as the consideration for the sale failed only on the date of the High Court decision and the cause of action for the suit arose only on that date ; and (2) that plaintiff was entitled to the costs of his unsuccessful litigation except the costs of his review petition.

Hanuman Kamat v. *Hanuman Mandur* [1], expld and distd., *Subbaraya* v. *Rajagopala* [2], *Venkataramayya* v. *Lanka Ramabrahmam* [3], referred to.

Second appeal against the decree of the Court of the Subordinate Judge of Tanjore in A. S. No. 25 of 1917, (A. S. No.

* S. A. No 80 of 1918. 9th December, 1918.

1. (1891) I L. R. 19 C. 123 P. C. 2. (1914) I. L. R. 38 M. 887.
3. (1918) 35 M. L. J. 124.

Sarvothama Row v. Chinnasami Pillai.

20 of 1917 District Court, Tanjore) preferred against the decree of the court of the District Munsif of Trivadi in O. S. No. 426 of 1915.

P. S. Vaidyanatha Aiyar for Appellant.

K. Rajah Aiyar for Respondent.

The court delivered the following

Judgment :—The managing member of a joint Hindu family consisting of himself and his brother sold the suit properties to a stranger on 22nd December 1908. The younger brother sold his share alone to the plaintiff on 12th January 1909. There was also a mortgage outstanding on the property. When the plaintiff attempted to take possession he was resisted by the purchaser from the manager. Thereupon he sued for possession of the half share sold to him. He succeeded in the first court. The Lower Appellate Court held that the sale by the manager was binding on the plaintiffs' vendor and dismissed the suit. In Second appeal, this decree was confirmed ; an application to review the judgment also failed. The decision of the High Court in the Second appeal was given on the 18th February 1915. This suit for refund of the sale price and for the expenses of the costs incurred in the unsuccessful litigation was instituted within three years of the judgment of the High Court. The Courts below have held that the suit was not barred by limitation.

Before us, the learned vakil for the appellant relied on *Hanuman Kamat* v. *Hanuman Mandur* [1], for the proposition that the cause of action for the refund of the money arose when the plaintiff was refused posssession. In the case before the Privy Council, the managing member of a Mithila family who was only entitled to dispose of the shares of his brothers with their consent and not, as under the Mitakshara Law to alienate family property for justifiable purposes alienated the family property. When the vendee sought to take possession the other brothers resisted. The Judicial Committee pointed out that as the alienation depended on consent and as that consent was certainly refused when the brother refused to give possession, the cause of action arose on that date. In the present case, the plaintiff's vendor was competent to dispose of

1 (1891) I. L. R. 19 C. 123.

Sarvothama Row v. Chinnasami Pillai.

his share and the manager had a right *prima facie* without consulting his brother to deal with the property for family purposes. It was only when it was finally determined that the sale by the plaintiff's vendor could not take effect against the sale by the manager that the former sale became infructuous; consequently it was only then that the consideration failed. This case is practically the second of the class of cases referred to in *Subbaraya* v *Rajagopala* [1]. The decision in *Venkataramayya* v. *Lanka Ramabrahmam* [2], also supports this view. We think the suit is not barred by limitation.

It was next contended that the costs of the litigation should not be given to the plaintiff. He was bound to have sought the aid of the court to vindicate the title of his vendor and the litigation expenses must be regarded as having been legitimately incurred. These damages are not too remote as laid down in *Krishnan Nambiar* v. *Kannan* [3], and in *Digambar Das* v. *Nishibala Debi* [4].

We are, however, of opinion, that the plaintiff is not entitled to recover the costs of this unsuccessful attempt to have the decision of this court reviewed. It is a luxury he indulged in for which the defendant should not be held liable. The sum of Rs. 55-9-9 allowed under this head should be deducted from the decree. In other respects, we confirm the decree of the Lower Appellate Court.

Parties will pay and receive proportionate costs throughout.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SESHAGIRI AIYAR AND MR. JUSTICE PHILLIPS.

K. Pathumma Umma and others... *Appellants** (*Defendants 1 to 6*).

v.

M. Thittu Umma alias Kunhi Umma and another *Respondents* (*Plaintiff and 7th Defendant*).

Pathumma Umma v. Thittu Umma.

Mahomedan Law—Gift—Validity—Property in possession of licensee—Donee enabled to take possession—Effect.

Under the Mahomedan Law gift of immoveable property in the actual occupation of a licensee from the donor is not invalid. *Fakir Nynar Muhamed Rowther* v. *Kandaswami Kulathu Vandan* [5] distgd.

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* S. A. No. 2521 of 1917. 18th November, 1918.

1. (1914) I. L. R. 38 M. 887.
2. (1918) 35 M. L. J. 124.
3. (1897) I. L. R. 21 M. 8.
4. (1910) 8 I. C. 91.
5. (1911) I. L. R. 35 M. 120.

Pathumma Umma v. Thittu Umma.

If the donee has been enabled to take possession, the fact that possession was not physically delivered would not matter.

Second Appeal against the decree of the District Court of South Malabar in A. S. No. 339 of 1917 preferred against the decree of the Court of the Additional District Munsif of Tirur in O. S. No. 123 of 1916 (in O. S. No. 68 of 1915 on the file of the Court of the Principal District Munsif of Tirur).

P. V. Parameswara Aiyar for *C. V. Anantha Krishna Aiyar* for Appellant.

A. V. K. Krishna Menon for Respondents.

The court delivered the following

Judgment :—The donor in this case was the mother of the plaintiff. She had a son who was the husband of the first defendant; defendants 2 to 6 are their children. The property in suit came to the donor under a deed of settlement. She was in possession and she allowed her son, his wife and children to live with her. Her son died in May-June 1914. She then left the house temporarily and executed a deed of gift to plaintiff while she was living in the latter's house. This was on the 23rd July 1914. She directed her daughter to take possession from the defendants. When the daughter's husband attempted to enter the house on behalf of his wife, he was resisted. Hence this suit.

It is clear from the judgment of the District Judge that the defendants were licensees who were permissively in occupation. There can be no doubt that this finding is based on legal evidence. Ex. I a petition sent by the defendants to the Registrar practically admits that they were in the house with the permission of the donor, Beevi Umma.

The question is whether as the licensees were physically in occupation of the house, the owner should be regarded as being out of possession. Mr. Justice Abdur Rahim in *Fakir Nynar Muhamed Rowther* v. *Kandasami Kulathu Vandan* [1]. says this. " For instance, if the thing is in the hands of a pledgee or a hirer or lessee or any other person whose possession is attributable to the existence of some right or interest of his own in the property or in the hands of a *ghasib*, that is, a person who has obtained possession of the property without the consent of the owner, the owner in all such cases cannot make a valid gift ".

1. (1911) I. L. R. 35 M. 120 at 129.

Pathumma Umma v. Thittu Umma.

It is pointed out by this learned judge in his book on Muhamadan Jurisprudence that such a consideration could not apply to the possession of a licensee. This is what he says in page 276, "Suppose a friend comes into my house to see me, it cannot be said that he is in possession of the house as he has no intention to exclude me from it. Hence, it is that the law speaks of the possession of a licensee as possession of the owner." It is clear therefore the donor was in law in possession on the date of the gift. The cases quoted by Mr. Parameswara Aiyar are those in which the person in possession had a legal right to continue in possession before eviction in due course of law. The case of a licensee is not analogous to them.

The next question is whether the donor has given such possession as Muhamadan law requires; of course mere registration of the document by itself is not enough. If, the donee has been enabled to take possession, the fact that possession was not physically delivered would not matter. Mr. Ameer Ali in his book, Vol. I, page 114, says. " Power to take possession is equivalent in certain instances to actual delivery of possession." We think in this case there was authorisation by the donor to take possession from persons whom she had out of affection allowed to reside with her. They were bound to go out if the donor asked them to vacate, and we think, the donee who was authorised to take possession was similarly entitled. Mr. Tyabji in his book states the rule as regards the nature of the possession that should be given in the same terms as Mr. Ameer Ali has stated it. In our opinion all that was necessary to give possession was done by the donor and that consequently the gift is not invalid for want of seisin.

We think the District Judge was right in the view of the law he has taken; we dismiss the second appeal with costs.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SESHAGIRI AIYAR AND MR. JUSTICE PHILLIPS.

Raghunathaiya v Saldanha.

Sujir Raghunathaiya ... *Appellant** (*Defendant*).

v.

Sobina Saldanha *alias* Rebelle ... *Respondent* (*Plaintiff*).

Mortgage of moveables—Redemption—Right of—Contract to contrary—Effect—Deed—Construction—Mortgage by conditional sale—Sale with covenant to reconvey

* S. A. No. 489 of 1918. 6th December 1918.

Raghu nathaiya v. Saldanha.

In the case of a mortgage of moveables the right of redemption subsists notwithstanding a contract to the contrary.

In the construction of the documents in the case, their lordships held that the transaction in question was a mortgage by conditional sale and not a sale with a covenant to reconvey.

Second Appeal against the decree of the District Court of South Canara in A. S. No. 8 of 1917 preferred against the decree of the court of the District Munsif of Mangalore in O. S. No. 26 of 1916.

B. Sitarama Row and *Ramnath Sujir* for Appellant.

K. Yegnanarayana Adiga for Respondent.

The Court delivered the following

Judgment :—Although a large number of decisions were quoted before us, we think that on a question of construction we should be guided in the first instance by the language of the instrument and by the facts of the particular case. There are circumstances in this case which justify the view taken by the courts below. In the first place, the conveyance is not an absolute one. The document begins and ends by saying that it is a conditional sale : Secondly there is a provision for payment of interest and the loan is spoken of as principal. Thirdly, the mortgagor is asked to pay the premia. Further there is no provision for reconveyance even, and lastly there is a provision for obtaining a receipt on payment of the loan. All these circumstances indicate that there is the relationship of creditor and debtor and also that of accountability between the parties. We think the courts below held rightly that the Ex. A was a mortgage.

Mr. Sitarama Row then raised an interesting question on which there is not much authority in India. He argued that the Judicial Committee enunciated in *Pattabhiramier* v. *Vencata Rao* [1] a general principle applicable to all Indian mortgages whether they be of realty or of personalty, that the contract between the parties should be given effect to and that the rule "once a mortgage always a mortgage" ought not to be extended to India. But in *Thambusami Mudali* v. *Hossain Rowthan* [2] this judgment was modified to the extent of holding that if parties had contracted with reference to the Madras course of decisions. *Pattabhiramier* v. *Vencata Rao* [1] would not

1. (1870) 13 M. I. A. 560. 2. (1875) I. L. R. 1 M. 1.

Raghu nathaiya v. Saldanha.

govern those transactions. The Board further intimated that the legislature should settle the law. The legislature did enact the Transfer of Property Act in 1882 but the provisions were limited to immoveable property. The learned vakil argued that as no express law was passed relating to the pledge of moveables, *Pattabhiramier* v. *Venkata Row* [1] should govern the transaction. It must be remembered that the above case related to immoveable property. There is no ground for presuming that the Judicial Committee intended to enunciate a rule applicable to moveable properties also by that judgment. Again, the rule in England seems quite settled that in the case of a pledge of moveables the right of redemption would subsist notwithstanding any contract to the contrary. This was forcibly illustrated in the case of the mortgage of Policies in *Salt* v. *Marquess of Northampton* [2]. There it was held that notwithstanding a construction that after the death of the mortgagor his legal representatives should have no right of redemption, the clause was held to be inoperative. In India, although there is no express law with reference to moveables the principles embodied in the Transfer of Property Act have generally been applied to them. Vide *Mahamaya Debi* v. *Haridas Haldar* [3]. Therefore, if we are to invoke the aid of justice, equity and good conscience in dealing with such cases, whether we apply the English Law or accept the analogy of the Indian Law relating to immoveables, the result is that notwithstanding terms debarring redemption the mortgage can be redeemed if the transaction in its inception was a mortgage. We think it is undesirable to place moveables on a different footing from immoveables on a matter like this.

For all these reasons we confirm the decree of the District Judge and dismiss the second appeal with costs.

A. S. V.

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1. (1870) 13 M. I. A. 560. 2. L. R. (1892) A. C. 1
3 (1914) I. L. R. 42 C. 455.

PRIVY COUNCIL.

PRESENT :—LORD PHILLIMORE, SIR JOHN EDGE, AND SIR LAWRENCE JENKINS.

[On appeal from the High Court of Judicature at Madras.]

Raja Rajeswara Dorai, Rajah of Ramnad ... *Appellant.**

v.

V. Sundara Pandiyasami Tevar ... *Respondent.*

P. C.

Raja Rajeswara Dorai *v.* Sundara Pandiya-sami Tevar.

Hindu widow—Whether her husband's reversioner is her legal representative—Abatement of suits—Civil Procedure Code (Act V of 1908) Order 22, Rules 3, 5.

A Hindu widow may so deal with the income of her husband's estate as to make it an accretion to the corpus. It is a question of fact to be determined, if there is any dispute, whether a widow has or has not so dealt with her property. If she has so dealt with it the next reversioner may be her legal representative with regard to it.

An objection under Order 22, Rule 5 should be taken at once.

Appeal from a decree of the Madras High Court, dated October 28, 1914, affirming a decree of the District Judge of Madura.

The facts sufficiently appear from their Lordships' judgment. The question raised on the appeal was whether the appellant was liable to pay to the respondent and his heirs and assignees an annuity of Rs. 700 a month. The District Judge held that the plaintiff respondent was entitled to the annuity but that it was not a charge on the estate. On appeal the High Court (Wallis, C. J. and Seshagiri Iyer, J.), amended the District Judge's decree by declaring that the annuity was a charge on the estate.

De Gruyther, K. C.—(*E. B. Raikes with him*) for appellant: On a true construction of the compromise of January 8, 1861, plaintiff has no right to the allowance or annuity. The effect of the compromise is to limit the annuity to the grantee's lineal heirs. Pooler Tever was not a lineal descendant of Dorai Sami, but only a collateral.

Again the grant offends against Hindu Law if construed as the Lower Courts have done : it creates an estate in perpetuity.

In any case, if it be a matter of covenant and not of conveyance no charge is created, and if there be no charge the suit must fail, for a grantor cannot bind his successors.

(Reference was made to *Sri Lakshmi* v. *Madhava* [1], *Mahomed Hussain* v. *Nehaluddin* [2]. Transfer of Property Act, S. 40).

The words "putra pautra" used in the compromise are words of limitation, not of general inheritance : *Ekradeshvar Singh* v. *Janeshwari* [3].

P. C. Appeal No. 13 of 17. * 7th November, 1918.

1. (1892) L. R. 20 I. A. 9.
2. (1883) 13 C. L. R. 330.
3. (1914) L. R. 41 I. A 275, 285 ; 27 M. L. J. 373.

P. C.

Raja Rajeswara Dorai *v.* Sundara Pandiyasami Tevar.

Further, on the death of the seccnd plaintiff, the widow, her interest did not devolve on the third plaintiff, who bought the widow's rights to arrears from the reversioner : he was not her-legal representative. So far as the arrears are concerned the suit has abated : *Balabai* v. *Ganesh* [1].

Sir Erle Richards, K. C. and *Kenworthy Brown*, for respondent, were not called on.

Their Lordships' judgment was delivered by

Lord Phillimore.

Lord Phillimore.—This is an appeal from the decree of the High Court of Judicature at Madras, affirming, with a modification, the decree of the District Judge of Madura, who ordered that the second defendant, that is the present appellant, should pay out of the income of the Ramnad Zemindari to the third plaintiff, the present respondent, the sum of Rs. 24,126-10-8 with interest, and should also pay future instalments from the date of the plaint at the rate of Rs. 700 a month, and gave that plaintiff the costs of the suit.

The first question which the Board has to decide is upon the construction of a deed of compromise, which is the root of the title of the third plaintiff. That compromise passed between the ancestor of the appellant and the ancestors though not the lineal ancestor, of the respondent, and by that compromise between two parties claiming the impartible Zemindari, the ancestor of the present appellant retained the Zemindari subject to his giving up one village and paying an annual sum of Rs. 700 per month to the ancestor of the present respondent. It has been contended that the effect of that compromise was to limit the payment of the Rs. 700 to the lineal heirs of the grantee and that, as the present respondent is only a collateral heir and only represents, by virtue of the assignment under which he claimed, a nearer collateral heir of the grantee, he is not within the terms of the deed. Both Courts below have taken the opposite view and their Lordships see no reason to differ from that view. The ground may be put quite shortly : It was a compromise dividing the estate—not dividing the estate equally by any means, but giving a share to the grantee of this annuity, and a larger share to the other party. The less successful party got a village and an annuity, the more successful party got all the rest of the property. There is every reason to suppose that the intention of the parties was that.

1 (1902) I. L. R. 27 Bom. 162.

P. C.

Raja Rajeswara Dorai v. Sundara Pandiyasami Tevar.

Lord Phillimore.

just as one side was to keep the majority of the property for himself and his heirs, lineal or collateral as the case might be, so the other side was to have the village, and, in the same way, the annuity, for himself and his heirs lineal or collateral as the case might be. If the question of construction be determined with reference to the village, the sense of this view is even more marked. Therefore one of the grounds for the appeal fails.

A second contention was that this was a creation of a kind of perpetuity, which the law did not allow, or an attempt to create a permanent relation which was impossible of creation. Whatever might be said about that, if this agreement lay in covenant, seeing that it lies in charge, there is no difficulty in making it perpetual as long as there are lineal or collateral heirs of the grantee, and in our view the District Judge and Mr. Justice Seshagiri Aiyar, in the High Court, were right in holding that this is a charge. In that respect, and in that respect only, we differ from the view taken by the learned Officiating Chief Justice. If it is a charge the modification which the High Court made in the decree of the District Judge is, by the allowance of counsel for the appellant, not injurious to his client. The decree of the District Judge may well be read as making the annuity a charge on the whole Raj, and it is very much more convenient, and indeed in the interest of the appellant, that it should be limited in the way proposed by the decree of the High Court, that is to say, that it is to be referred back to the District Judge so that he shall settle on what part of the Ramnad Zemindari the charge shall be allowed. That being so, there is no objection to the decree so far.

A point was taken that the third plaintiff, claiming under an assignment from a nearer reversioner had not made out his title to the assignment ; that it was void for want of consideration ; that it was obtained by fraud, or some similar objection. It is enough to say that their Lordships agree with the courts below in saying that there is nothing in any of these points.

The one matter which requires a little more consideration is as to the title of the third plaintiff to maintain his decree for the arrears of the annuity. Now the suit in the first instant was brought by the first plaintiff, who claimed to be the adopted son of the previous grantee, and the widow of the previous grantee as second plaintiff, and she sued for herself and for her

P. C.

Raja Rajeswara Dorai v. Sundara Pandiya-sami Tevar.

Lord Phillimore.

heirs: "Plaintiffs therefore pray"—that is the adopted son and the widow—"for a decree in favour of the first plaintiff and his heirs or the second plaintiff and heirs as may be found entitled." No doubt the prayer goes on to pray that the declaration may be in favour of the first plaintiff and his heirs or the second plaintiff and reversioners, and that the arrears may be paid to the first plaintiff or the second plaintiff as the case may be. The first plaintiff sued as an adopted son, and his claim was found to be unfounded, and he was dismissed and has not appealed. The second plaintiff, the widow, died in March, 1910, and shortly afterwards the next reversioner sold his rights to the third plaintiff for a small consideration and in order to effect a family settlement. Among the rights which he professed to pass were the widow's claim to the allowances. Thereupon the present third plaintiff petitioned to be substituted in the suit in place of the second plaintiff, so that he might carry it on, and he set out by reference the deed of assignment as a part of his title and prayed that he might be "brought on record as legal representative in place of the deceased second plaintiff." The present appellant resisted this application on the ground that the assignment was fraudulent, and perhaps for other reasons ; but he took no objection based on the fact that the third plaintiff was claiming to be brought on the record as the legal representative of the deceased second plaintiff ; he did not say that, while he might go on the record as the assignee of the next reversioner, and to that extent fulfil part of the position of the deceased second plaintiff, he was not the legal representative of the deceased second plaintiff, and could not exhaust the whole claim by being substituted for her; and, he not taking that point, the learned Judge made an order which declared the third plaintiff to be the legal representative of the deceased second plaintiff, and that the suit do proceed. It may be observed in passing that if the third plaintiff was only a partial legal representative of the second plaintiff the suit which was proceeding as to the arrears would have been defective. It is now said, and very elaborately argued on behalf of the appellant, that the present respondent is not and cannot be the legal representative of the widow so as to be in a position to claim for or give a good discharge for the arrears, which were very considerable, of the

P. C.

Raja Rajeswara Dorai v. Sundara Pandiyasami Tevar.

Lord Phillimore.

annuity, and that therefore the suit fails as regards all that claim, and must be limited to a declaration *de futuro*. Their Lordships think the answer to this is that a widow may so deal with the income of her husband's estate as to make it an accretion to the corpus. It may be that the presumption is the other way. A case has been cited to their Lordships which seems so to say. But at the outside it is a presumption and it is a question of fact to be determined, if there is any dispute, whether a widow has or has not so dealt with her property. The third plaintiff when he petitioned to be substituted in her place relied upon a title which purported to assign to him the widow's arrears of the annuity as well as the right to the annuity *de futuro*, and if there was an accretion to the estate that title would be a good one, the next reversioner could pass it to him and he properly represents the estate in respect of the whole. As no objection was taken, as no issue was raised, as the matter was not even raised on appeal from the District Judge (because we cannot take a general allegation in the memorandum of appeal as pointing to this question), it was too late to raise it after the High Court had decided the matter, and it is therefore not open to their Lordships to consider whether or not a good case could have been made requiring the addition of some other representative of the widow.

Upon the whole, the case for the appellant fails, and their Lordships will humbly advise His Majesty that the decree of the Court below should be affirmed, and that this appeal should be dismissed with costs.

Solicitor for appellant:—*Douglas Grant.*

Solicitors for respondent:—*Chapman, Walker and Shephard.*

A. P. P.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR JOHN WALLIS, KT. CHIEF JUSTICE AND MR. JUSTICE SESHAGIRI AIYAR.

Sri Rajah Rao Venkata Mahipati Gangadhara Ramarao Bahadur Garu and others ... *Appellants.** (*Respondents 1 and 2—plaintiffs*).

v.

Sri Rajah Rao Venkata Kumara Mahipati Surya Rao Bahadur Garu and others. *Respondents* (*Petitioner and Respondents Nos. 3, 5—defendants. 1, 2, and 4.*)

Sri Rajah Rao Venkata Mahipati Gangadhara Ramarao Bahadur Garu *v.* Sri Rajah Rao Venkata Kumara Mahipati Surya Rao Bahadur Garu

Civil Procedure, S 2 (2) and O. 1, R. 10—Order striking out the name of a defendant and dismissing suit as against him—Decree—Appealability—Specific Relief Act, S. 42—Declaratory relief—Discretion of court—Suit for bare declaration that plaintiff is the next reversioner and not the defendant, if maintainable.

Where in a pending suit the court makes an order striking out the name of one of the defendants and dismissing the suit as against him on the ground that the plaint disclosed no cause of action, the order though purporting to be made under O. 1, R. 10 of the C. P. Code is a decree and is appealable as such.

The grant of declaratory relief under S. 42 of the Specific Relief Act is discretionary with the Court and there is a settled rule of practice against the grant of such relief when the only question for decision is which of two persons is entitled to the character of next reversioner at the date of the institution of the suit—a decision which may serve no useful purpose as both the claimants may be dead and a different person entitled to succeed when the succession actually opens. Where the plaintiffs sued for a bare declaration that they were the next reversioners of a deceased Hindu and that the defendant was not entitled to usurp the character of next reversioner, *Held*, that the suit was not maintainable. *Saudagar Singh* v. *Pardip Narayan Singh* [1] Referred to.

Appeal against the order of the Court of the Subordinate Judge of Cocanada dated 22nd October 1917 in I. A. No. 474 of 1917 in O. S. No. 44 of 1916.

C. P. Ramaswami Aiyar and *A. Suryanarayana Aiyah,* for Appellants.

The Hon. The Advocate-General and *K. N. Aiya Aiyar,* for 1st Respondents.

P. Narayanamurthi, for the 2nd and 3rd Respondents.

The Court delivered the following

Judgments :—*The Chief Justice.*—This is an appeal from an order striking out the name of the 1st defendant on a petition under O. 1, R. 10 for the amendment of the plaint. No separate appeal is provided under the Code from orders passed under this rule, but in this case the Subordinate Judge

* A. S. No. 360 of 1917. 2nd October, 1918.

1 (1917) I. L. R. 45 C 510 P. C.

Sri Rajah Rao Venkata Mahipati Gangadhara Ramarao Bahadur Garu v. Sri Rajah Rao Venkata Kumara Mahipati Surya Rao Bahadur Garu.

decided to strike out the 1st defendant's name on the ground that the plaint disclosed no cause of action against him and ordered the suit to be dismissed as against him. In these circumstances I think the order comes within the definition of a decree and is appealable as such. The facts are these: The 4th defendant is the widow of a junior member of the Pittapur family, and the Rajah of Pittapur the 1st defendant has recently brought a suit as next reversioner of the property in her enjoyment for a declaration that an adoption made by her is invalid. The widow, as one of the defences, contested the Rajah's claim to be the next reversioner and denied that he was related to her deceased husband. The present plaintiffs, who also deny the Rajah's relationship and claim to be themselves the next reversioners to the estate in the hands of the widow, sought unsuccessfully to be made parties to that suit for the purpose of establishing as against the Rajah that they are the next reversioners. Having failed in that attempt, they then instituted the present suit against the Rajah and the widow for a declaration that the Rajah the 1st defendant is not the nearest reversioner, or a reversioner at all, of husband of the 4th defendant; and for a further declaration that the adoption of the 2nd defendant by the 4th defendant was invalid. The 2nd and 4th defendants in their written statements have not challenged the plaintiff's claim to be the next reversioners, and indeed, it is their case in the suit brought against them by the Rajah that the plaintiffs and not the Rajah are entitled to that character. In these circumstances it is clear that the Rajah is not a necessary party to the suit as between the plaintiffs and the widow and the adopted boy, and that the suit against him cannot be supported unless it be held, as argued, that the plaintiffs are entitled to maintain a separate suit against the Rajah for a declaration that the plaintiffs and not the Rajah are the next reversioners of the deceased and that the latter is not entitled to usurp the character of next reversioner. Mr. C. P. Ramaswami Aiyar argued that the plaintiffs are persons entitled to the lawful character of next reversioners within the meaning of S. 42 of the Specific Relief Act, and that they are entitled under that section to bring a declaratory suit against the 1st defendant who questions it. The granting of the relief under that section is discretionary with the Court, and it appears to me that there

Sri Rajah Rao Venkata Mahipati Gangadhara Ramarao Bahadur Garu *v.* Sri Rajah Rao Venkata Kumara Mahipati Surya Rao Bahadur Garu.

Wallis, C. J.

is a settled rule of practice against the grant of such relief when the only question for decision is which of two persons is entitled to the character of next reversioner at the date of the institution of the suit—a decision which may serve no useful purpose, as both the claimants may be dead and a different person entitled to succeed when the succession actually opens. In the most recent case in *Saudagar Singh* v. *Pardip Narayan Singh* [1], Lord Parker of Waddington, delivering the Judgment of the Judicial Committee, stated that the point was simply whether, under the practice prevalent in India, such a declaration, that is, a declaration under S. 42, ought to have been made. In the present case, I think the Subordinate Judge was right in holding that it ought not. Mr. Ramaswami Aiyar argued that the fact that the Rajah had brought a suit in the character of next reversioner made a difference, but his client has refrained, no doubt advisedly, from praying by way of consequential relief for an injunction restraining the Rajah from prosecuting the other suit. Whatever grounds the plaintiffs may have had for asking to be made parties defendant in the other suit, a matter not now before us, they ought not in my opinion to be allowed, either by reason of that failure or on any other ground, to maintain the present suit against the Rajah and the Subordinate Judge was right in dismissing it. The appeal fails and must be dismissed with costs.

Seshagiri Aiyar, J.

Seshagiri Aiyar, J :—I am of the same opinion. This appeal raises some interesting questions. The plaintiffs who are the appellants sued for a declaration that the 1st defendant is not the nearest reversioner to the estate of one Rajah Venkata Rao and that he is not entitled to conduct any proceedings in respect of the said estate and for a further declaration that the adoption of 2nd defendant made by the 4th defendant to her husband the said Venkata Rao is not valid. The late Rajah of Pittapur had a brother named Rajah Venkata Rao. The latter before his death, it is alleged, gave his wife, the 4th defendant authority to adopt a son. She adopted the brother of the plaintiffs. The 1st defendant is the present owner of the Pittapur Zemindari. On the death of the last Zemindar his status as Aurasa son of the Zemindar was challenged. The High Court and the Judicial Committee

1. (1917) I. L. R. 45 Cal. 510=34 M. L. J. 67.

Sri Rajah Rao Venkata Mahipati Gangadhara Ramarao Bahadur Garu *v.* Sri Rajah Rao Venkata Kumara Mahipati Surya Rao Bahadur Garu

Seshagiri Aiyar, J.

without expressing any opinion on this question held that under the will of the previous Zemindar the 1st defendant was entitled to the estate as *persona designata*. This was in 1912.* In O. S. No. 55 of 1915 the present 1st defendant brought a suit for a declaration that the present 4th defendant was not entitled to adopt a boy to her husband. The present plaintiffs intervened and they wanted to be made parties to that suit. Their application was dismissed. In revision the High Court refused to interfere. That suit is now being tried. In substance the present plaintiffs' contention is that as the 1st defendant is not the Aurasa son of the late Zemindar he is not the nearest reversioner to the estate of Rajah Venkata Rao and that consequently he has no right to bring a suit to declare that the adoption by Rajah Venkata Rao's widow is invalid. The Subordinate Judge in a carefully written judgment came to the conclusion that the 1st defendant's name should be struck out and that the prayer against him should be deleted. Against that order this appeal has been preferred.

A preliminary objection was taken by the learned Advocate-General against the maintainability of the appeal. His contention is that the order of the Subordinate Judge comes under O. 1, R. 10, Cl. 2 of the Civil Procedure Code and that no appeal is provided against it under O. 43. In a way the conclusion of the Subordinate Judge may be said to come within O. 1, R. 10. But what we have to see is the substance of the order and not the form of it. In his order the Subordinate Judge examines the right of the plaintiffs to bring a suit like the present one and concludes having regard to certain authorities which he has quoted, that such a suit would not lie. In my opinion this is an adjudication determining the rights of the plaintiffs to bring a suit of this nature ; and his order is a "decree" as defined in S. 2, Cl. 2 of the Civil Procedure Code. There is one other answer to this preliminary objection. I am disposed to agree with Mr. C. P. Ramaswami Aiyar who appeared for the appellants that unless the removal of the plaintiff or defendant leaves the suit intact O. 1, R. 10 Cl. 2 cannot apply. In this clause the words are : "The Court may order that the name of any party improperly joined whether as plaintiff or defendant be struck out." That

* The P. C. decision was in 1899 [Ed.]

is to say, the impropriety is in introducing a party who has no connection with the reliefs claimed in the plaint. Moreover O. 1, R. 10 clause 2 does not relate to the deletion of reliefs, but only to the striking out of parties. Consequently, where a substantial right has been adjudicated upon and where the party's name has been struck out on the ground that a suit against him would not lie and where a substantial relief claimed in the suit has been ordered to be deleted, I am of opinion that the Court has "conclusively adjudicated the rights of the parties with regard to a matter in controversy," and that therefore the order of the Subordinate Judge is a decree. The preliminary objection must therefore be overruled.

Sri Rajah Rao Venkata Mahipati Gangadhara Ramarao Bahadur Garu v. Sri Rajah Rao Venkata Kumara Mahipati Surya Rao Bahadur Garu.

Seshagiri Aiyar, J.

On the merits, very elaborate arguments were addressed to us on both sides. It is now settled that a reversioner has no personal right of action. If he happens to be the next reversioner or if he is able to prove that the next reversioner has neglected his rights, he is given a right of action as representing the entire body of the reversioners. In other words he has no individual rights or in the language of S. 42 of the Specific Relief Act, "is not entitled to any legal character in his own right." Therefore the first of the ingredients necessary to enable him to sue under S. 42 of the Specific Relief Act is wanting.

Mr. Ramaswami Aiyar referred to some decisions of this Court as supporting his contention. In *Bobba Padmanabhudu* v. *Bobba Buchamma* [1], I pointed out that a suit by a reversioner for a declaration that his divided brother did not give authority to adopt as alleged by his widow, is maintainable. My conclusion was in accordance with the judgment of the Judicial Committee which I quoted. I do not think that any observation of mine in that judgment lends support to the maintainability of the present suit. Reference was also made to *Naganna* v. *Sivanappa* [2], wherein I traced the history of actions under S. 42. Mr. Ramaswami Aiyar referred to the head-note which makes it appear as if the suit was brought by a reversioner and contended that if a reversioner was allowed to sue for a declaration that a decree obtained by a third party against property in the hands of the widow is not binding on him, the present suit is equally maintainable. In my judgment I pointed out that the suit was not really one by a

1. (1918) 35 M L J. 144. 2. (1914) I. L. R. 38 Mad. 1162; S. C. 27 M L J. 520.

Sri Rajah Rao Venkata Mahipati Gangadhara Ramarao Bahadur Garu v. Sri Rajah Rao Venkata Kumara Mahipati Surya Rao Bahadur Garu

Seshagiri Aiyar, J.

reversioner but by a person who had succeeded to the property on the death of the widow. Even in my judgment the expression 'reversioner' appears in one or two places. But the expression has not been employed as referring to the rights of persons before succession opens to them, but only as describing what their status was before the widow died. That decision therefore does not help the appellants. On the other hand there is the decision of the Judicial Committee in *Janaki Ammal* v. *Narayanaswami Aiyar* 1, which seems to be conclusive on the question now in dispute. In that case the suit was brought by a reversioner for a declaration that the widow was wrongfully wasting and alienating the property. In the first court the allegations of waste and alienations were found against. But as there was an issue whether the plaintiff was a reversioner, the first court gave a decree embodying such a declaration. On appeal to the High Court, this court agreed with the Lower court that no acts of waste were proved and held that the declaration should remain. Before the Judicial committee it was contended for the respondents that "as next reversioner he was the proper person to sue for the protection of the estate and therefore he had a "legal right as to property" within the meaning of S. 42 of the Sp. Rel. Act" It is with reference to this contention that their Lordships say in page 639 : "And in their Lordship's opinion the case must accordingly be treated as if the suit had been directed *simpliciter* to a declaration of the plaintiff's individual right. In the view of the Board it is not legitimate to give a plaintiff, under cover of a request for "further relief," after all the substantial heads of a claim have failed, greater right to obtain a declaration that he would have had *if such a declaration had been asked directly and unaccompanied by other and unfounded claims.*" These observations are exactly in point. If the suit against the first defendant is to be regarded simply as one for a declaration that the plaintiffs are the reversioners and not the 1st defendant, the observations of the Judicial Committee leave no room for doubt that such a suit would not be maintainable. Mr. Ramaswami Aiyar sought to distinguish this case by arguing that this was not a case in which there were rival claimants, to the nearest reversionership. I do not think that this matters. In *Janaki*

1. (1916) I. L. R. 39 Mad. 634=31 M. L. J. 225.

Sri Rajah Rao Venkata Mahipati Gangadhara Ramarao Bahadur Garu v. Sri Rajah Rao Venkata Kumara Mahipati Surya Rao Bahadur Garu.

Seshagiri Aiyar, J.

Ammal v *Narayanaswami Aiyar* [1] there was an issue whether the plaintiff was the nearest reversioner. The fact that the nearest reversionership was denied by the widow and not by another reversioner is not a ground for distinction. I have already pointed out that each reversioner has not an individual legal character. Mr. Ramaswami Aiyar referred to the decision in *Saudagar* v. *Pardip Singh* [2] where a declaration as to the status of the nearest reversioner was embodied in the decree. Lord Parker distinguishes the case in *Janaki Ammal* v. *Narayanaswamy Aiyar* [1] on the ground that the declaration in the case before the Board was only incidental to the main relief given in the case. It is stated in the judgment: "It is quite true that it involves a finding that the plaintiffs in this case are reversionary heirs, but that must always be the case where a declaration is made following the illustration (e) of the Section, because it is only in virtue of the persons claiming the declaration being reversionary heirs, and therefore presumptively entitled that the declaration is made." In that case the substantial declaration was as to the validity of the document, and the declaration as to reversionership was really a part of the main relief given in the case. I do not think this decision is any authority for the proposition that a bare declaration of the status as a reversioner lies under S. 42 of the Specific Relief Act. I do not think it necessary to examine the other cases quoted at the bar. I think the decision of the Subordinate Judge is right and this appeal should be dismissed with costs.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PHILLIPS, AND MR. JUSTICE KRISHNAN.

Gopalasami Naick and another ... *Appellants** (*Defendants*).

v.

Nammalwar Naick ... *Respondent* (*Plaintiff*).

Gopalasami Naick v. Nammalwar Naick.

Civil Procedure Code O. 21 R. 2—Payment out of court in satisfaction of decree—Omission to certify payment—Application by decree-holder to execute the decree—Breach of implied contract—Suit for damages by judgment-debtor—Cause of action, when arises—Limitation—Limitation Act, Art. 115, applicability of—Damages, measure of.

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* S. A. No. 279 of 1917. 9th October 1918.

1. (1916) I. L. R. 39 Mad. 634 : 31 M. L. J. 225.
2. (1917) I. L. R. 45 Cal. 510 ; 34 M. L. J. 67.

Gopalasami Naick v. Nammalwar Naick.

A decree-holder who receives money outside court in payment of the decree amount, does so under an implied contract that he would certify that payment as required by law and that he would not execute the decree any more for the amount so paid or realise it again in execution Where therefore, a decree-holder omits to certify such payment to the court and applies to execute the decree, he commits a breach of the implied contract which gives rise to a cause of action to a suit for damages by the judgment-debtor. The filing of the execution petition in itself gives rise to a cause of action though no money may have been realised ; and successive applications will give rise to successive breaches and fresh causes of action. If money is subsequently realised that will give a fresh cause of action as a further breach of the contract. The amount of damages payable for breach of the contract will be different in each case. Where money is realised from the judgment-debtor in execution over again, that amount will form the main portion of the damages but where it is not so realised damages will be awarded only as compensation for any injury caused to the plaintiff and for any loss or expense incurred by him, by reason of the attempt to execute the decree, which ought to have been treated as satisfied. The period of limitation applicable to a suit for damages under the above circumstances, is that provided by Art. 115 of the Limitation Act.

Viraraghava Reddi v *Subbakka* [1], *Sriramulu* v. *Dalayya* [2] followed.

Second Appeal against the decree of the District Court of Tinnevelly in A. S. No. 9 of 1916, preferred against the decree of the Court of the District Munsif of Koilpatti in O. S. No. 299 of 1914.

K. R. Rangasami Aiyangar, for Appellants.

V. Visvanatha Sastri, for Respondents.

The Court delivered the following

Phillips, J.

Judgments :—*Phillips, J.* :—Appellants' chief contention is that plaintiff can have no cause of action until money has been recovered from him in execution. In *Viraraghava Reddi* v. *Subbakka,* [1] a similar suit was held by the majority of this Court to be one to recover damages for the breach of the implied promise to certify the payment to the Court and thereby make it effectual in execution. The third Judge, no doubt, based the right of suit on the failure to discharge a statutory duty. The two views are very similar, but the former is, I think, more accurate, for the duty of certifying satisfaction imposed by the Code of Civil Procedure can be performed at any time, and no period is prescribed for its performance, whereas if the cause of action, be held to be the breach of an implied covenant not to execute the decree, any application for execution would be a breach of the covenant, and would give a right to sue for damages. I think therefore that plaintiff had a cause of action,

1. (1882) I. L. R. 5 M. 397. 2. (1905) 16 M. L. J. 54.

when the execution application of 1910 was filed, but a suit on that cause of action would now be barred under Article 115 of the Limitation Act. As plaintiff cannot act upon this breach of the covenant, he relies upon a subsequent breach in 1913, treating the first breach as condoned and in this view his suit is within time.

Treating the suit as one for damages the measure of damages is not necessarily the sum paid by plaintiff in satisfaction of the decree together with subsequent interest, for that is the maximum amount of damages that plaintiff could suffer if the decree were actually executed and plaintiff could only claim that sum if it were actually recovered from him. In the present case it is necessary to consider how far plaintiff has been damaged by the filing of the execution application which is the breach of covenant complained of. He would be entitled to all expenses incurred by him in defending the claim, and also to compensation for any moral or mental worry caused by the fact that an executable decree is unlawfully kept alive, and steps may be taken against the judgment-debtor at any moment. I therefore agree in the order proposed by my learned brother.

Krishnan, J :—The facts necessary for the decision of this Second Appeal may be briefly stated as follow. A mortgage decree was obtained by the father of defendants 1 and 2 against the plaintiff and his sons in 1906. In 1907 plaintiff paid Rs. 500 towards this decree ; this payment though denied by defendants has been found to be true by both the Lower Courts. Plaintiff alleged a further payment of Rs. 40 but that has not been proved. Without certifying the payment of Rs. 500 and without giving credit for it defendants applied for execution for the whole decree amount, first in July 1910 and then again in June 1913. In July 1914 plaintiff brought this suit praying that the defendants may be directed to certify payment or to pay back the amount paid with interest at 18 per cent. The Lower Courts disallowed the first prayer ; the Munsif held that it could be granted only in execution proceedings under Order XXI, Rule 2, Civil Procedure Code ; and no objection was taken to this view in the Appellate Court. The Munsif had dismissed the suit *in toto* as barred by limitation but the District Judge has given a decree for Rs. 500 and interest at 18 per cent. as claimed.

Gopalasami Naick v. Nammalwar Naick.

Krishnan, J.

The first point argued before us is that as no money had been realised in execution of the decree plaintiff had no cause of action at all. We must therefore consider what the nature of the plaintiff's suit is and what his rights are. The nature of a suit like the one before us was considered by a Full Bench of this High Court in *Viraraghava Reddi* v. *Subbakka*, [1] and though Kindersley, J., was of opinion that the suit should be taken as based on the ground of fraud or negligence on the part of the decree-holder in not certifying the payment to Court as he was under a statutory obligation to do, the majority consisting of Turner, C. J., and Muthuswami Aiyar, J., considered it to be "a suit to recover damages for the breach of the implied promise to certify the payment to the Court and thereby make it effectual in execution." I am prepared to follow the view of the majority that the suit is really one for damages for breach of implied contract. When a decree-holder receives from the judgment-debtor money outside court in payment of the decree amount, if there is no express agreement between the parties at the time, it may properly be held that the decree-holder does so under an implied promise that he would certify that payment as required by law and that he would not execute the decree any more for the amount or realise the amount again in execution. If this is the implied contract, as I think it is, the breach will give rise to a cause of action ; and it is clear that the decree-holder commits a breach as soon as he files his execution petition claiming the same amount again. It seems to me therefore that the filing of the execution petition in itself gives a cause of action though no money may have been realised ; and successive applications will give rise to successive breaches and fresh causes of action. If money is subsequently realised that will give a fresh cause of action as a further breach of the covenant. In each case the amount of damages payable for the breach will have to be ascertained. Where money is realised from the judgment-debtor in execution over again, that amount of course will form the main portion of the damages but where it is not so realised as in the present case the damages awarded can only be by way of compensation for any injury caused to plaintiff and for any loss that he may have been put to, by the decree, which ought to have been

1 (1882) I. L. R. 5 Mad. 397

Gopalasami Naick
v.
Nammalwar Naick.
Krishnan, J.

treated as part satisfied, being attempted to be executed in full against him. That of course will not include the amount that has not yet been realised.

This view is to some extent supported by the ruling in *In the matter of Medai Kaliani Anni,* 1 thought that case does not deal with the measure of damages. There the claim was treated as one based on the ground of breach of duty ; but as already stated I am inclined to think that is really a breach of an implied contract as held by the majority in the Full Bench. The case in *Sriramulu* v. *Dalayya,* 2 has been cited to us as against this view. But that case contains no discussion of the law and no reasons are given for the view held and I am unable to follow it. It overlooks the fact that coercive processes may be adopted in execution of a decree and considerable injury may be caused thereby to the judgment-debtor without any money being realised. If the decree-holder's action in taking out fresh execution was wrongful, there is no reason why he should not be liable in damages resulting from it. The ruling in *Arunachalla Pillai* v. *Appavu Pillai,* 3 is no longer law as it was departed from the later Full Bench in *Viraragava Reddi* v. *Subbakka* 4. I therefore hold that the recovery of the decretal amount in execution was not essential to give a cause of auction to the plaintiff and this suit is maintainable.

The next question argued is one of limitation. Respondent's vakil contended that Art. 120 should be applied. But that is a residuary article and can be applied only if no other article applies. In the view I am taking of the nature of the suit, it clearly falls under Art. 115 so far as it claims refund of the money paid. The relief claimed by way of injunction to direct defendants to certify payment was disallowed by the first court and not asked for in the appellate court and has been expressly abandoned before us by the respondent's vakil, as he was entitled to do. It is not therefore necessary to discuss what article applied to the suit with reference to that relief ; nor is it necessary to consider whether such relief could be given in a suit.

We have a case here of two successive breaches of implied contract by two successive applications in execution, one made

1. (1907) I. L. R. 30 Mad. 545.
2. (1905) 16 M. L. J. 51.
3. (1866) 3. M. H. C. R. 188.
4 (1882) I. L. R. 5 Mad. 397.

Gopalasami Naick v. Nammalwar Naick.

Krishnan, J.

in 1910 and the other in 1913. So far as the claim is based on the first application it is barred by limitation as the suit was filed in 1914, *i. e.*, more than three years from the date of the cause of action. But the plaintiff is entitled to damages resulting from the application in 1913 as he is within time for it. The decree of the Lower Court is clearly erroneous in holding that the plaintiff was entitled to recover the whole of the money paid by him with 18 per cent interest. If defendants had realised the money a second time that would have formed a proper item of damages but not otherwise. There must be a finding on the question "what damages, if any, is plaintiff entitled to as the result of defendants' execution application in 1913." Parties may adduce fresh evidence, Finding two months ; objections seven days.

[In compliance with the order contained in the above Judgment, the District Judge of Tinnevely submitted a finding to the effect that the plaintiff sustained no damages in connection with the execution proceedings.]

Judgment.—Upon the finding that plaintiff has sustained no damages in connection with the execution proceedings he had no grounds for coming to Court. His suit must therefore be dismissed, but in the circumstances each party will bear his own costs throughout.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE AYLING AND MR. JUSTICE KRISHNAN.

The Secretary of State for India represented by the Collector of Cuddappah ... *Appellant** (*Petitioner—Creditor*).

v.

Dadi Reddi Nagiah ... *Respondents* (*Respondents*).

The Secretary of State for India v. Dadi Reddi Nagiah.

Provincial Insolvency Act, Ss. 4 ( ) and 5—Nominal transfer of property by debtor with a view to defraud creditors—Act of insolvency—'Nominal' and 'Sham' transaction, distinction between.

A debtor who executes a nominal sale deed of his property with a view to defraud his creditors commits an act of insolvency under S. 4 (b) of the Provincial Insolvency Act.

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* A. A. O. No. 84 of 1918. 20th September 1918.

The Secretary of State for India *v.* Dadi Reddi Nagiah.

Per Krishnan, J.—The idea underlying a "nominal" transfer is to formally vest the title in one's nominee so that he may hold the property openly for himself but secretly for one's own benefit, using the document as a cloak to save it for one's own self from his creditors. For that purpose it is necessary to legally vest the title to the property in the transferee and the deed is executed with that very object.

A sham transfer is one which the parties have no intention to give effect to and which does not in any way affect the property or any interest therein. The document executed is a mere nullity and of no value or effect regarding the property.

Appeal against the order of the District Court of Cuddappah dated the 28th January 1918 in Insolvency Petition No. 22 of 1917.

The Government Pleader for Appellant.

K. Kotti Reddi and *P. Narayanamurthi* for Respondents.

The Court delivered the following

Judgments :—*Krishnan, J.*—This appeal arises from an application made by the present appellant to the District Judge under S. 5 of the Provincial Insolvency Act to have the 1st respondent adjudged an insolvent on the ground that he committed an act of insolvency by executing and giving to the 2nd respondent a deed of sale of some of his properties within 3 months previously, with the intent of defeating the appellant's debt. In this petition that deed was stated to be a "nominal" deed. The 1st respondent admitted that as he was greatly indebted, and feared that his creditors might take away all his properties he executed the sale-deed in question nominally and for no consideration out of confidence in the 2nd respondent who was a close relation of his. The 2nd respondent who had been made a party to the proceedings pleaded on the other hand that the sale was a valid one made *bona fide* and for proper consideration. Krishnan, J.

The learned District Judge dismissed the appellant's petition without taking any evidence holding that it did not disclose any act of insolvency. He treated the allegation in the petition that the sale-deed was a nominal one as meaning that the transaction was a sham transaction and as he considered that such a transaction was a pure nullity and did not effect a transfer of the property within the meaning of S. 4, cl. (b) of the Provincial Insolvency Act and as it could not possibly defeat or delay creditors, he held that no act of bankruptcy had been committed by the 1st respondent by executing the sale-deed.

The Secretary of State for India v. Dadi Reddi Nagiah.

Krishnan, J.

If we are to understand by a "sham" transaction, a transaction which the parties have no intention whatever to give any effect to and in which the document executed is a mere nullity, a piece of paper of no value or effect regarding the property, it may be that such a transaction, not effecting any transfer of property by its very nature, is insufficient to constitute an act of insolvency, as S. 4 (b) requires a transfer to be made. In *Isitt* v. *Beeston* [1], it was laid down that an actual transfer of property in or of some interest in goods was necessary to constitute an act of bankruptcy. The same principle will, no doubt, apply to immoveables also. The language of cl. (b) is also clear.

But I am of opinion that the District Judge was in error in thinking that the allegation in the present case was of the nature described in the above paragraph. What the appellant stated was that the deed was a nominal one and not that it was asham one. I understand by the expression "nominal" that the deed was executed to the 2nd respondent and in his name really for the benefit of the 1st respondent himself. The idea is to formally vest the title in one nominee so that he may hold the property openly for himself but secretly for one's own benefit, using the document as a cloak to save it for one's self from his creditors. In such a case far from there being no intention to give any effect to the deed, the parties have the serious intention of defeating creditors by it. For that purpose it is necessary to legally vest the title to the property in the transferee and the deed is executed with that very object. In such a case it seems to me clear that there is a transfer of property effected by the deed if the formalities required by law for a proper document have been complied with as they have been in this case.

It is not the case of the petitioner that the document was got up with no intention to give any effect to it as the District Judge supposes, for he says expressly that it was intended to defeat him. In fact it was explained to us by the Government Pleader for the appellant that the word "nominal" was inadvertently used in the petition and it was quite unnecessary to make an averment that the deed was a nominal one, we have allowed him to amend his petition by omitting that word.

1. (1869) L. R. Exch. 159.

The Secretary of State for India v. Dadi Reddi Nagiah.

Krishnan, J.

On the petition as it now stands, there is no foundation at all for thinking that the deed of sale was alleged to be a "sham' one. But even on the petition as it stood before I consider that the view taken by the District Judge of the allegation in it is not well founded. It is not the case of the insolvent either that the deed was a mere sham, for he also asserts that though it was for no consideration it was executed to defeat creditors. On the other hand the transferee contends that it was taken by him *bona fide* for full and proper consideration. The intention to transfer is thus clear according to all parties ; the questions whether consideration was paid and whether the transferee was to hold the property for the transferor's benefit are immaterial in this connection, and as a formal deed of sale was executed and registered in the 2nd respondent's name, I must hold that a transfer of the legal title to the property was effected by it and if that transfer is shown to be made with the intent to defeat creditors, it is an act of insolvency.

The District Judge has also observed in his Judgment that there must be a real obstacle created in the way of creditors for them to be defeated or delayed, for an act of insolvency to be committed. There can be no doubt that a benami deed executed by a debtor as a cloak to save his properties from his creditors is a very serious obstacle in their way and if they fail to prove its real nature they will not only be delayed but defeated altogether. In fact so far as the creditor is concerned the mischief is greater in such a case for he is unable to have recourse to the consideration money which would presumably be available for him when the transfer-deed is for consideration. There is therefore all the more reason for holding that a nominal deed executed for defeating creditors is an act of bankruptcy. No authority has been cited to show that a deed of transfer can be treated as not amounting to an act of bankruptcy merely because it is a "nominal" deed. I think such a deed is as much within the meaning of cl. (b) as any deed for consideration is.

I am therefore unable to support the District Judge's view in this case. But before the 1st respondent is adjudged an insolvent it must be established that his intent in executing the deed of sale was to defeat or delay creditors. It is true that he has admitted this intention ; but as the transferee has been made a party to these proceedings as 2nd respondent and as he

The Secretary of State for India. v. Dadi Reddi Nagiah.

Krishnan, J.

has pleaded that the transfer is a *bona fide* one made in good faith and for valuable consideration and as the sale-deed to him is the very document relied on as giving rise to the act of Insolvency, I think it is proper that the question whether it does amount to such an act should be tried before the 1st respondent is adjudicated. The matter, I think, should not be left to be disposed of hereafter on an application under S. 36 or S. 37 of the Act in the circumstances of this case.

I would therefore reverse the order of the District Judge and remand the application to him for fresh disposal. Costs here to be costs in the cause.

Ayling, J.

Ayling, J.—As at present advised I concur in the view taken by my learned brother of the meaning of the words "makes a transfer" in S. 4 (b) of the Provincial Insolvency Act. I speak thus cautiously, because we have not had the benefit of any argument *contra* and the words are open to the construction placed upon them by the learned District Judge. The broader view is, however, not only as it seems to me, the more reasonable one, but, certainly, the one most in accord with the public interests.

I agree in the order proposed.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE AYLING AND MR. JUSTICE SESHAGIRI AIYAR.

Alla Pichai Rowthan ... *Appellant* (1st Defendant).*

v.

Pappathiammal alias Ammal Bibi and others ... *Respondents (Plaintiffs 1 to 3 and Defendants 2 & 3).*

Alla Pichai Rowthan v. Pappathiammal.

Administrator de son tort—Liability to account—Limitation—Claim by Muhammadan heirs whether a joint cause of action.

An administrator de son tort of properties is not responsible as an agent to render an account of the properties He is only responsible to refund the moneys which he has received on behalf of the estate.

In a Muhammadan family, the heirs are entitled to definite shares as tenants in common ; and the cause of action of such heirs cannot be said to be a joint one for the purpose of limitation.

Ahinsa Bibi v. *Abdul Kadir Saheb* [1] considered.

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* Appeal No. 128 of 1917. 19th April, 1918.

1. (1901) I. L. R. 25 Mad. 26.

Alla Pachai Rowthan v. Pappathiammal.

Appeal against the decree of the Court of the Subordinate Judge of Madura in O. S. No. 79 of 1914

K. V. Krishnaswami Aiyar for Appellant.

K. Jagannadha Aiyar for Respondents.

The Court delivered the following

Judgment :—Two Muhammadan brothers Sanjiappa Rowthan and Sheik Muhammad Rowthan acquired considerable properties. Sheik Muhammad died in 1894 and Sanjiappa Rowthan in 1901. The three plaintiffs are the widow, the son and daughter respectively of Sanjiappa. The 2nd and the 3rd defendants are the widow and daughter of Sheik Muhamad. The 1st defendant is the husband of the 3rd defendant.

The case for the plaintiffs is that after the death of Sanjiappa Rowthan the properties were entrusted to the management of 1st defendant on behalf of the members of the Muhammadan family, that during the management the 1st defendant misappropriated the properties, that thereupon certain mediators interceded and obtained the transfer of some of the properties to the plaintiffs and that the 1st defendant is still retaining monies belonging to the plaintiffs. The 1st defendant denied his agency and his liability to account.

The Subordinate Judge in an unnecessarily long Judgment has come to the conclusion that the 1st defendant managed the properties honestly until 1909, that since then he had not been discharging his duties properly and that therefore he should be held accountable for monies received by him since 1909. The 1st defendant and the plaintiffs have filed a memorandum of objections.

The legal position of the 1st defendant has not been correctly appreciated in the court below. We are satisfied that the 1st defendant was asked to manage the properties belonging to the share of Sheik Muhammad. We do not agree with Mr. K. V. Krishnaswamy Aiyar that unless there is direct evidence of an appointment as agent the 1st defendant cannot be held liable; but the agency which is inferable from the course of conduct pursued by the 1st plaintiff and the 1st defendant cannot affect plaintiffs 2 and 3. It is now well settled in this Presidency that a Muhammadan mother is not the *de jure* guardian of her children. (*Ayderman Kutti* v. *Syed Ali.* [1])

1. (1912) I. L. R 37 Mad. 514 : 23 M. L. J. 244.

Alla Pichai Rowthan v. Pappathi-ammal.

Consequently the 1st defendant could not have been appointed either expressly or impliedly by the 1st plaintiff to be the agent for management of the properties of the second and third plaintiffs. The position occupied by the 1st defendant must under the circumstances be taken to be, as agent of the 1st plaintiff and as *administrator de son tort* of the properties of the second and third plaintiffs. This being the legal relationship of the parties, the question now for consideration is whether the claim for an account has become barred either wholly or in part. There can be no doubt that an administrator *de son tort* is not responsible as an agent to render an account. He is only responsible to refund monies which he has received on behalf of the estate. See Williams' Law of Executors and Administrators, Vol. 1, p. 190. See the observations in *In re Stevens* : *Cooke* v. *Stevens*. [1] Consequently the 1st defendant is bound to restore to plaintiffs 2nd and 3rd all the monies received by him from their estate. That estate consists of two classes of property : One consisting of lands which are in the possession of cultivating ryots, the other consisting of bonds for monies borrowed from the estate. As regards the former the finding of the Subordinate Judge which is supported by evidence is that until 1909 the 1st defendant had not misappropriated or retained any monies belonging to the share of the two minor plaintiffs. Therefore he is liable to plaintiffs 2 and 3 only for monies received by him since 1909, and up to the beginning of 1911, when the decision of the arbitrators was given. As regards the latter class of property apparently all the bonds whether renewed in the name of the 1st defendant or still standing in the name of the minor plaintiffs were handed over to the mediators in 1911. The mediators decided that if the 1st defendant was guilty of laches in collecting the monies on the bonds and had thereby allowed them to be barred by limitation, he should make good to the various plaintiffs the loss occasioned by his conduct. Therefore the liability of the 1st defendant so far as the bonds are concerned is regulated by the decision of the arbitrators by Ex. 11 and not by his liability as administrator *de son tort*. The result will be that so far as the bonds are concerned the 1st defendant should be held liable only in respect of any time-barred debts between 1909

1. (1898) 1. Ch. 162 at p. 178.

Alla Pichai Rowtnan v. Pappathi-ammal.

and 1911. After 1911 the 1st defendant having severed his connection with the management any laches on the part of the two plaintiffs to collect monies due to them should not be charged against him. The decree of the Subordinate Judge as far as plaintiffs 2 and 3 are concerned will be modified as indicated above.

As regards the 1st plaintiff the Subordinate Judge says that her right of suit is not barred, because the claim of the second and third plaintiffs is not barred by limitation. We are unable to agree with him. It is true that the decision in *Ahinsa Bibi* v. *Abdul Kadar Saheb* [1] lends support to the view taken by the Subordinate Judge. But we fail to see how in a Muhammadan family where the heirs are entitled to definite shares as tenants in common the cause of action of such heirs can be said to be a joint one. In the case of the 1st plaintiff she was a major and she entrusted the 1st defendant with the management of her property. She has not brought the suit within three years of the termination of the agency consequently her claim so far as the income from landed properties is concerned is barred by limitation. So far as her right to get her share of the time barred debts for which under the award of the arbitrators the 1st defendant was held responsible her claim is saved by Ex-11. The decree in favour or the 1st plaintiff can only be for the loss occasioned to her in respect of the bonds items 1 to 31 mentioned in the plaint schedule.

As regards the Memorandum of objections in the view we have taken of the legal relationship of the parties the claim on behalf of the 1st plaintiff and of the other plaintiff is unsustainable. That is dismissed with costs. In the appeal parties will pay and receive proportionate costs.

C. A. S.

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1. (1901) I. L. R. 25 Mad 26.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SESHAGIRI AIYAR.

Kunhi Coya Haji ... *Petitioner** (*Plaintiff*).

v.

Panikka Vittil Assan Bava Haji and others ... *Respondents* (*Defendants*).

Kunhi Coya Haji *v.* Assan Bava Haji

Indian Stamp Act, (*Act II of* 1899,) *S.* 19—*Promissory note executed outside British India—Suit on—Whether promissory note admissible in evidence without the proper stamp.*

A promissory note executed outside British India can be sued on in British India and is admissible in evidence, without the proper Indian stamp being affixed to the same.

Simulu Ebrahim Rowthan v. *Abdul Rahiman Mahomed* [1], *Mahomed Rowthan* v. *Mahomed Husin Rowthan* [2] followed.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the court of the Subordinate Judge of South Malabar at Calicut in S. C. S. No. 317 of 1917.

V. Mahadeva Aiyar and *G. R. Sivaramakrishna Aiyar*, for Petitioner.

K. P. Kesava Menon, for Respondents.

The Court delivered the following

Judgment :—The suit is based upon the promissory notes executed at Mecca in favour of the plaintiff. The Subordinate Judge has held that they are inadmissible in evidence. He has not referred to any authorities in support of his position. Apparently what he had in mind was S. 19 of the Stamp Act. It was pointed out in *Simulu Ebrahim Rowthan* v. *Abdul Rahiman Mahomad* [1] and *Mahomad Rowthan* v. *Mahomad Husin Rowthan* [2], that it is not necessary before suit to affix a British stamp on documents executed outside British India unless it be for the purposes of acceptance, payment, endorsement, transfer or negotiation It is argued for the respondent that filing a suit comes under one of these categories. I am unable to agree with this suggestion. If a document is valid according to the law of the place where it was executed, it can ordinarily be sued upon in India without affixing any Indian stamp on the document. Probably the suggestion of Shephard, J., in *Simulu Ebrahim Rowthan* v. *Abdul Rahiman. Mahomad* [1] may be accepted, namely that if any stamp is necessary it would be sufficient if at the time of the decree an Indian

* C R P. No. 444 of 1918 — 10th October 1918.

1. (1898) 8 M. L. J 182. 2. (1899) I. L. R. 22 Mad. 387; 9 M. L. J. 135.

stamp is affixed to the document. I am not sure whether under the law prevailing in Mecca a promissory note like this without any stamp on it could have been sued upon.

Kunhi Coya Haji v. Assan Bava Haji.

But the position taken up by the Subordinate Judge is certainly untenable. It is opposed to the decisions I have referred to. I must therefore reverse his decision and remand the suit for disposal in the light of the above observations. Costs hitherto incurred will follow the event.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE AYLING AND MR. JUSTICE KRISHNAN.

Wallace Sitha Boi ... *Petitioner** (*Respondent*).

v.

Wallace Radha Boi ... *Respondent* (*Petitioner*.)

Sitha Boi v. Radha Boi.

Guardians and Wards Act S. 4 (2), 7 (2), 41 (3), 45 (1) (c) *and* 48—De facto *guardian—Whether guardian within the meaning of S.* 4 (2)—*Appointment or declaration as guardian removes a de facto guardian—Court competent to require a* de facto *guardian to deliver infant's properties to the guardian appointed or declared under the Act—S.* 48 *does not cover a "requisition" under S.* 41 (3).

A *de facto* guardian is a guardian within the meaning of Sec. 4 (2) of the Guardians and Wards Act.

A *de facto* guardian is *ipso facto* removed from guardianship under S. 7 (2) by the Court's order appointing a guardian.

The Court has power under S. 41 (3) of the Act to require a *de facto* guardian to deliver the infant's properties to the guardian appointed under the Act.

The expression 'orders made under the Act" in S. 48 of the Act does not cover the case of a "requisition" under S. 41 (3) and a separate suit will lie to contest the propriety of the requisition under S. 41 (3).

Petition under S 115 of Act V of 1903 and S. 48 of Act VIII of 1890 praying the High Court to revise the order of the District Court of Tanjore in I. A. No. 363 of 1917 (in O. P. No. 775 of 1916.

The facts of the case are as follows :—

A Hindu died leaving behind him his widow, his mother, and his infant son. His mother, the paternal grand-mother of the infant, purporting to be in possession of the infant's properties on his behalf applied to be appointed as guardian under the Guardians and Wards Act. The District Court after considering all the circumstances declared the mother of the infant as guardian under the Act. The

* C. R. P. No 35 of 1918. 3rd and 8th October 1918.

Sitha Boi v. Radha Boi.

mother applied under S. 41 (3) of the Guardians and Wards Act to recover a house belonging to the minor from the possession of the grand-mother. The grand-mother contended that the house had been settled on her by her son during his life-time and that an application under S. 41 (3) would not lie in the present case. Both these contentions were overruled by the District Judge who ordered the delivery of the house. The grand-mother applied under S. 115 of the Civil Procedure Code for revising the order of the District Judge.

B. Narasimha Rao, for the Petitioner.

K. V. Krishnaswami Aiyar and *C. A. Seshagiri Sastri*, for the Respondent.

The Court delivered the following

Judgment :—In this petition we are asked to interfere in revision with the proceedings of the District Judge of Tanjore requiring a *de facto* guardian (grand-mother) of a minor under S. 41 (3) of the Guardians and Wards Act to hand over a house as one belonging to the minor. We can find no ground for interference. The term "guardian" in the sections must be understood in the light of the definitions in S. 4 (2) and would include the present petitioner. The latter was *ipso facto* removed from guardianship under S. 7 (2) by the court's order appointing the minor's mother to be guardian. The District Judge has not exceeded his jurisdiction and petitioner must be referred to a suit to establish if she can, her title to the house. We may remark that S. 48 of the Guardians and Wards Act which refers to "orders made under the Act" would not cover the case of a "requisition" under S. 41 (3) of the Act; vide reference to the latter in S. 45 (1) (c).

The petition is dismissed with costs.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT : SIR JOHN WALLIS, Kt., CHIEF JUSTICE, AND MR. JUSTICE NAPIER.

The Official Assignee of Madras ... *Appellant** (*Petitioner*)

v.

The Official Assignee of Madras v. Mehta and Sons.

T. B. Mehta and Sons ... *Respondents* (*Garnishees*)

Presidency Towns Insolvency Act, Ss. 55 and 56—Transfer of property by debtor to creditor—Fraudulent preference, test of—Voluntary transfer —"Good faith" in S 55, meaning of.

* O. S. A. No. 4 of 1918. 4th December 1918.

The Official Assignee of Madras v. Mehta and Sons

A trader in embarrassed circumstances being pressed for payment by one of his numerous creditors transferred some of his moveables to the creditor in discharge of the debts, due to him and with the balance of the sale proceeds, continued to carry on his business and pay off, other pressing claims. It was found that at the time of the transfer in question the debtor was in insolvent circumstances and had no prospect of meeting his obligations as they fell due. It was not shown however that the properties were sold for less than their fair value or that the transferee knew that the debtor was carrying through the transfer for any purpose other than that of discharging his liability and carrying on his business The debtor was subsequently adjudged an insolvent. On an application by the Official Assignee to declare the transfer void under S. 55 or S. 56 of the Presidency Towns Insolvency Act.

Held, that the transfer in question did not come within the scope of S. 55 or S. 56 of the Presidency Towns Insolvency Act and was valid as against the Official Assignee.

To constitute a fraudulent preference within the scope of S. 56 of the Presidency Towns Insolvency Act it must be shown that the transaction in question was entered into by the debtor with the dominant and substantial view of perferring a particular creditor. The mere fact that as a result of the transaction a particular creditor was preferred to the prejudice of the other creditors is insufficient.

Per Naiper, J: A transfer cannot be said to have been made "in good faith" within the meaning of S. 55 of the Presidency Towns Insolvency Act, if it is made in fraud of the bankruptcy laws.

Ex parte *Griffith* [1], Ex parte *Hill* [2], *Sharp* v. *Jackson*, [3], *Nalam Visvanathan* v. *Official Assignee of Madras* [4], not followed.

On appeal from the judgment of the Hon'ble Mr. Justice Coutts Trotter dated 13th December 1917 passed in the exercise of the Insolvency Jurisdiction of this Court in I.P.No. 115 of 1917.

M. D. Devadoss instructed by *Messrs. Short* and *Bewes* for the Appellant,

Nugent Grant instructed by *Messrs. Grant* and *Greatorex* for the Respondents.

The Court delivered the following

Wallis, C. J.

Judgments :—*The Chief Justice*: This is an appeal from an order of Coutts Trotter, J., dismissing the Official Assignee's application by notice of motion for a declaration that the sale of diamonds by the insolvent on and after the 19th May 1917 to the garnishees T.B. Mehta and Sons, was void as a fraudulent preference under S. 56 of the Presidency Towns Insolvency Act or in the alternative under S. 55 as the sale was not *bona fide* and for valuable consideration. In my opinion the decision of the learned Judge was right on both points. We are not now concerned with the propriety or morality of the insolvent's conduct in obtaining large quantities of diamonds

1. (1889) L. R. 23 Ch. D. 69.
2. (1883) L. R. 23 Ch. D. 695.
3. L. R. (1899) A. C. 419.
4. (1915) 32 I. C. 795.

The Official Assignee of Madras v. Mehta and Sons.

Wallis, C. J.

on credit from various firms and pledging them for advances to Nattukottai Chetties and in persisting in this course when he was clearly in insolvent circumstances and had no prospect of paying for them. These are matters to be taken into consideration at another stage. In the middle of May 1917 the insolvent was in very embarassed circumstances and was unable to meet his obligations as they fell due. He was indebted to the garnishees Messrs. Mehta and Sons, a Madras firm with whom he had had large transactions, in Rs. 36,062 against which eight hundies were outstanding and also in Rs. 3000 on general account. Two hundies which fell due on the 19th were not presented at his request. (Ex. 10 dated, 14-5-1917) but a third hundi which fell due on the same day was not met and they began to press him. The insolvent then proposed that the garnishees who were diamond merchants should purchase from him diamonds which were under pledge to various Nattukottai Chetties and apply the surplus after discharging the pledges in satisfaction of the hundies. The diamond-market was then rising and Mehta accepted the offer and in the course of five transactions between the 25th May and 12th June, purchased diamonds to the extent of Rs. 2,87,000, and in this way obtained payment of the hundies. It is not now disputed that he paid a fair price for the diamonds. An examination of the pledgees' account in the course of the case revealed the fact that the purchases by the garnishees from pledgees were larger than was necessary to pay them off out of the surpluses and that the insolvent was paid over Rs. 41,000 by the pledgees as a result of the transactions. The evidence is that this result was obtained by including in the sales, apparently without the garnishees' knowledge, other diamonds which were not under pledge. Any adverse inference that might arise from this fact is negatived by the evidence that between the 25th May the date of the first of these sales and his arrest at the end of June, he made payments to the other creditors amounting to more than Rs. 71,000 to meet his more pressing obligations and at the same time put off other creditors. All this shows that he went on trading when in hopelessly insolvent circumstances, not that he entered into the transactions now impugned with a view to prefer these particular creditors. The learned Judge has rightly held that to

The Official Assignee of Madras v. Mehta and Sons.

Wallis, C. J.

bring a transaction within the scope of S. 56 it must have been entered into with the dominant view of preferring the particular creditor. That construction has recently been criticised in an unreported case in this court as proceeding upon a consideration of cases decided before the section was enacted. Lord Justice Bowen deprecated this mode of construction in *Ex parte Griffith* [1]: and *Ex parte Hill* [2] and in the latter case expressed the opinion on a careful consideration of the various ways in which the language of the section could be construed, that the words "with a view of giving a creditor preference over other creditors" must be read as equivalent to "with the view" the real, effectual, substantial view of giving a preference to the creditor, the word *a* being equivalent to *the*. That construction was accepted and was approved by the House of Lords in *Sharp* v. *Jackson* [3] several years before that section was re-enacted in India in 1907 and again in 1909, and the Indian Legislature must in my opinion have contemplated that that construction would be followed here. In the present case the evidence in my opinion does not show that the insolvent entered into these transactions with the dominant view of 'preferring the garnishees because, as is suggested, they were Madras creditors whereas most of the other creditors were in Bombay. The evidence rather shows in my opinion that he was acting throughout exclusively in his own interests and with a view to keep his business going which he could not do without satisfying the garnishees, creditors on the spot who were pressing him to meet his obligations and were not to be put off with excuses. As regards S. 55, the sales now in question were for full consideration and did not amount to an act of insolvency by reason of an intent to defeat or delay creditors or otherwise, and the purchaser, had no notice of an act of insolvency. In these circumstances they must be held to have been made in good faith and for valuable consideration and not to be avoided under S. 55. The appeal fails and is dismissed with costs. Costs on the Original Side scale.

Napier, J.

Napier, J:—This is an appeal from the judgment of Coutts Trotter, J., on a motion on behalf of the Official Assignee for a declaration that certain sales of jewels by the insolvent Muthiah

1. (1883) 23 Ch. D. 69. 2. (1883) 23 Ch. D. 695.
3. (1899) A. C. 419.

The Official Assignee of Madras v. Mehta and Sons.

Napier, J.

Chetty to the firm of T. B. Mehta and Sons are void as not being *bona fide* transactions and further as constituting a fraudulent preference of that firm in that the proceeds were largely utilised for discharging certain promissory notes given by the insolvent to the firm. The insolvent was a diamond merchant in a large way of business in Madras, purchasing diamonds here to a certain extent and to a much larger extent in Bombay. At the time of the sales he was in fact hopelessly insolvent. The sales covered a period between 25th May and 12th June 1917 and were completed in five transactions, on 25th May, 2nd June, 7th June, 8th June and 12th June. Nearly all the diamonds sold were under pledge to various lenders and the sales purported to be, according to the evidence of the garnishee, of those diamonds only, the garnishee buying the diamonds at an agreed price, paying the amount due on the pledge and crediting the balance as against promissory notes, with the result that the whole of the promissory notes and an amount due on general account to the garnishee was discharged, while much heavier debt on promissory notes to other creditors were left undischarged. The learned Judge has found that the sales are not void nor fraudulent preference.

Mr. Devadoss has attacked these findings as being based on an erroneous view of the law and also contends that on the true view of the facts they cannot be upheld. His contention on the law was as follows, that every transaction by which a creditor is given a preference is presumably fraudulent and that there are only three conditions under which such transactions will be sustained, namely, where the transaction is to recoup a breach of a trust, where the transaction is compelled by threats of legal proceedings and where the insolvent *bona-fide* believed he could avoid bankruptcy and entered into the transaction for that purpose. In my opinion, there is no warrant for this contention. All that Mr. Devadoss has been able to do is to invite our attention to cases in which these conditions have been held sufficient to establish that there was no fraudulent preference in the particular case. I entirely agree with what fell from the learned Chief Justice at the beginning of the argument that what we have to do is to construe the act with the assistance of decisions of eminent Judges in England on similar words in the English Statute. The learned trial Judge, although he does not

The Official Assignee of Madras v. Mehta and Sons.

Napier, J.

refer to the language of the section, starts with this proposition that he has to consider what was the dominant motive of the insolvent in carrying through this transaction. I agree that this is the real consideration in the case, but I think it advisable to state how this proposition is arrived at.

The Act to be construed is the Presidency Towns Insolvency Act, Act III of 1909, and the important sections are S. 9, which defines an act of insolvency, S. 55, which avoids certain transactions made within two years of insolvency, S. 56, which declares certain transactions within three months of the insolvency fraudulent and void, and S. 57 which protects certain transactions. The corresponding English Act is the Bankruptcy Act of 1883, and the corresponding sections are Ss. 4, 47, 48 and 49. Dealing first with fraudulent preference, the words of S. 56 with which we are concerned, are : "Every transfer of property, every payment made, by any person unable to pay his debts as they become due from his own money in favour of any creditor, with a view of giving that creditor a preference over other creditors, shall, if such person is adjudged insolvent, on a petition presented within three months after the date thereof, be deemed fraudulent and void as against the Official Assignee." The language of S. 48 of the English Act is *mutatis mutandis* identical. The first thing to be noted about this section is that it does not say that every transfer of property or payment by such a person *with the effect* of giving the creditor preference is fraudulent, and there can be no doubt that if the Legislature had intended to avoid all transfers and payments in favour of a particular creditor without considering the motive or the object of the insolvent, it would have used some such words as the above or omitted the words "with a view, etc." We have therefore to construe the words "with a view of giving that creditor a preference" as an essential requirement for a fraudulent preference. The learned Judge in the course of his judgment has referred with disapproval to an *obiter dictum* of a Judge of this Court in a case not reported in the authorised reports but to be found in *Nalam Visvanatham* v. *Official Assignee of Madras* [1]. I do not think that Coutts Trotter, J.'s criticisms are quite justified on the language of my learned brother though I am not

1. (1915) 32 I C. 795.

The Official Assignee of Madras v. Mehta and Sons.

Napier, J.

prepared to agree with some of the observations to be found in that language. I must say also that I think that the learned Judge's language is useful as drawing the attention to the fact that we have to construe a particular statute and not to apply principles founded on words which are not in the particular statute. The true rule of construction was laid in 1891 by the House of Lords in the well-known case of the *Bank of England* v. *Vagliano Brothers* [1] and approved of by the Privy Council in *Norendra Nath Sircar* v. *Kamalbasini Dasi* [2]. I am not certain that this rule has always been borne in mind in decisions on questions of fraudulent preference in cases in England, and specially I refer to a decision which was pressed on us by Mr. Grant *In re Cheese Brough* [3] from which, so far as the process of reasoning is concerned, I must respectfully dissent. We have however the guidance of very eminent Judges in England in cases where the language of the English statute was critically analysed, and I propose to refer to a few of them.

The first case which is very much in point is in *Ex-parte Griffith* [4] and especially the language of Bowen, L.J., at page 74. He there refers to the fact that in judicial decisions since the Bankruptcy Act there has been a tendency among courts to discuss the question whether the Act had altered the old law and introduced an entirely new law with the result that the court has been drawn into questions of pressure and volition and into motive of a motive, whatever that may mean, and he lays down that the true method is to go back to the words of the Statute and be guided by them. Here we have a very eminent Judge applying the principle which was subsequently laid down in the *Vagliano case* [1]. The next is *Ex-parte Hill* : *In re Bird* [5]. In that case the same learned Judge speaking of S. 92, the corresponding section of the Bankruptcy Act of 1869, says as follows :- " Whether that section has or has not altered the old law is not a matter that need be decided though there was considerable authority for saying that it has not. But, however that may be, we have to look to the words of S. 92 and they are " with a view of giving such creditor a preference over other creditors". He then considers the meaning of the words ' a view ' and says " I should prefer

1. (1891) A. C. 107. 2. (1896) I. L. R. 23 C. 563=6 M. L. J. 71.
3. (1871) 12 Eq. Cases 358. 4. (1883) 23 Ch D. 69.
5. (1883) 23 Ch. D. 695.

keeping to the word 'view' instead of 'motive' though in nine cases out of ten the two words may come to the same thing." He declines to accept the suggestion that the words 'a view' mean 'sole view' on the ground that if the legislature had so intended it would have used the word 'sole'. He is of opinion that the word 'a' is equivalent to 'the' and considers that 'the view' means the dominant and substantial view.

The Official Assignee of Madras v. Mehta and Sons.

Napier, J.

These two cases were followed and applied by a divisional Court in *In re Bell: Ex parte the Official Receiver* [1]. That was a case where, pressure was relied on as taking the case out of the Statute and Wright, J., laid down that in such a case it must be found that pressure was the substantial ground of the payment being made, which is of course equivalent to saying that the intention to prefer would not be the substantial ground. Vaughan Williams, J., says: 'The law is well-established now that one has to ascertain in each case what was the dominant motive which operated on the bankrupt's mind,' and in another part of the judgment, 'Was the substantial, effectual, or dominant view with which the debtor made the payment a preference of that creditor ?" The next case is the decision relied on by the learned Judge in *Sharp* v. *Jackson* [2]. There the learned Lord Chancellor endorses the view of Lord Esher in the Court of Appeal in the same case that the question depends not on the mere fact that there has been a preference but also on the state of mind of the person who made it, and that it is not sufficient to say that the natural consequence of the act being to prefer, the intention to prefer follows. This decision is specially important as it has been treated in subsequent cases as endorsing the correctness of the decision in the Court of Appeal in the same case. That is *sub-nominee* : *The trustee of the Property of New, Prance and Garrard* v. *Hunting and others* [3]. I have already referred to one extract from Lord Esher's judgment. Other passages are as follow : "what had he obviously in view when he executed this deed ? It seems to me clear, that he made this conveyance, not with the "intention", or "object" or whatever it may be called, of preferring those persons, but for the sole purpose of shielding himself. Under these circumstances what he did is not a fraudulent preference

1. (1892) 10 Morrel Bankruptcy Reports 15. 2. (1899) A. C. 419.
3. (1897) 2 Q. B. 19.

The Official Assignee of Madras v. Mehta and Sons.

Napier, J.

within the act.' A. L. Smith, L. J., says : 'I have always understood that, to ascertain whether there has been a fraudulent preference it is necessary to consider what the dominant or real motive of the person making the preference was ; whether it was to defraud some creditor by preferring others, for some other motive.' Chitty, L. J., says : "I ask myself what was really the view which Prance had in making this conveyance. Was it to prefer these particular trust estates to other creditors ? No. "It was to protect himself against the charges hanging over him." There can be no doubt that the Court of Appeal in this case were applying the tests laid down in *Exparte Griffiths* and *Exparte Hill* and in consequence of this unanimity of the Court of Appeal and its endorsement by the House of Lords. Wright, J., in *Buckley's Case* [1] said as follows : 'Ever since the decision in *New, Prance and Garrard's Trustees v. Hunting* [2] which has since been affirmed by the House of Lords (sub nom. *Sharp v. Jackson* [3]) so little difficulty has been felt by gentlemen who practise in Bankruptcy matters that questions of fraudulent preference comparatively seldom now arise.'

It is clear on the authority of these cases that no hard and fast rule can be laid down as to what facts will take a particular case out of the statute and it is not open to us to hold, as Mr. Devadoss would wish us to do, that certain circumstances only have been accepted by the courts for this purpose and no other circumstances will suffice. Mr. Devadoss relied on a decision in *In re Lake* [4], a breach of trust case. But this case is really against him, for there Wright, J., finding that there had been several breaches of trust of which only one was made good, held that there was a fraudulent preference. The Court of Appeal, it is true, found on the facts that it was not. But the learned Judges did not lay down, and I venture to think, could not lay down, a definite rule that where there are breaches of trust and one is made good, there cannot be a fraudulent preference. Indeed on those facts, I would myself prefer the finding of Wright, J.

[His Lordship next discusses the evidence in the case.]

I therefore agree with Coutts Trotter, J., that these transactions did not amount to a fraudulent preference.

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1. (1899) 2 Ch. 725.
2. (1897) 2 Q. B. 19.
3. (1899) A. C. 419.
4. (1901) 1 Q. B. 710.

The Official Assignee of Madras v. Mehta and Sons

Napier, J.

The remaining question can be shortly disposed of. It follows from the above finding that the transfer was not an act of bankruptcy under S. 9, Cl. (b). With regard to S. 55 which invalidates transfers not made in good faith and for valuable consideration within two years of insolvency, it has been established by the evidence of an expert witness that the price paid by the garnishee for the jewels was only 4 per cent. less than the valuation he would put on them. It is hardly necessary to say that such a variation cannot indicate anything more than a difference of opinion. There is no evidence that the garnishee knew that the insolvent was carrying through this transaction for any other purpose than that which he (the garnishee) thought, namely, discharging the liability to him, or that he was getting more money than was required for discharge of the pledge. Indeed Mr. Devadoss conceded this. There was therefore no want of good faith within the ordinary meaning of the term. It is true that the words ' in good faith ' have been held both in England and in this court to require that the transaction should not be in fraud of the bankruptcy laws. But as there has been no fraudulent preference it follows that there has been no fraud of the bankruptcy laws. In these circumstances I do not think it necessary to consider the case of *Shears* v. *Goddard: In re Sills* [1] and other English cases on the point. I therefore agree with the learned Chief Justice in dismissing the appeal with costs.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE AYLING AND MR. JUSTICE KRISHNAN.

Venkatasami Naik and another ... *Appellants** (*Defendants 1 and 3*).

v.

Sivanu Mudali and another ... *Respondents* (*Plaintiff and 2nd deft.*)

Venkatasami Naik v. Sivanu Mudali.

C. P. C., Ss 37, 38—Mortgage decree—Execution—Jurisdiction—Decree passed by Additional Munsif's court having no local Jurisdiction—Jurisdiction of court having territorial jurisdiction over mortgaged properties—Additional Court not ceasing to exist—Effect—Decree—Transfer for execution when cannot be made.

A mortgage decree was passed by the Additional District Munsif of Tinnevelly in respect of properties within the territorial jurisdiction of the Koilpatti Court

* C. M. A. No. 174 of 1918. 27th November 1918.

1 (1896) 3 Manson 24.

Venkatasami Naik v. Sivanu Mudali.

The Tinnevelly Court had no local jurisdiction at all, but was established simply to aid the other courts of the District. On a question arising as to whether the Koilpatti Court had jurisdiction to execute the decree under S. 38, C. P. Code when the Additional Court of Tinnevelly had not ceased to exist *held* that the Koilpatti court had no such jurisdiction unless and until the decree was transferred to it for execution.

An order transferring a decree for execution should not be made so as to evade the provisions of the Limitation Act or to validate an invalid application.

Appeal against the order dated the 26th November 1917 of the District Court of Tinnevelly in A. S. No. 86 of 1917, preferred against the decree of the court of the District Munsif of Koilpatti in E. P. No 190 of 1916 in O. S. No. 280 of 1906 on the file of the court of the Additional District Munsif of Tinnevelly.

L. A. Govindaraghava Aiyar for Appellants.

M. D. Devadoss for Respondents.

The court delivered the following

Judgment :—The appeal turns solely on the question of whether the District Munsif of Koilpatti had jurisdiction to entertain a petition (E. P. No. 190 of 1916) presented to him for execution of a mortgage decree passed by the Additional District Munsif of Tinnevelly in O. S. No. 280 of 1906 on his file. Territorial Jurisdiction over the hypotheca sought to be brought to sale in execution of the mortgage decree admittedly lay with the Koilpatti court while the Tinnevelly Court had no local jurisdiction at all, but was established simply to aid the other courts of the district, by disposing of suits transferred from their file. There had been a transfer of territorial jurisdiction to the Koilpatti court from that of Srivilliputtur in which the suit had originally been filed; but it is agreed that this circumstance makes no difference to the question for disposal, and we may consider the latter as if territorial jurisdiction had always been with the Koilpatti court. No order had been passed transferring the decree under S. 24 or S. 39 of the Civil Procedure Code; and the question is whether in these circumstances the Koilpatti court had jurisdiction to execute it under S. 38 of the Civil Procedure Code as the court which passed it.

In our opinion the answer must be in the negative. S. 37 of the Code of Civil Procedure gives an extended significance to the term "court which passed a decree" but contains nothing applicable to the present case. The Tinnevelly court

Venkatasami Naik v. Sivanu Mudali.

has certainly not ceased to exist and it cannot be said to have ceased to have jurisdiction to execute its own decree. Whatever jurisdiction as regards execution it possessed at the time of passing the decree, it still possesses. In fact this portion of S. 37 of the Civil Procedure Code clearly has reference to transfers of territorial jurisdiction from one court to another.

We must therefore hold that the Koilpatti court had no jurisdiction to execute the decree, unless and until the decree-holder got the decree transferred to it for execution. The order of the Koilpatti District Munsif rejecting the execution petition was therefore right.

In the concluding portion of his judgment, the District Judge directs that his order allowing execution should operate as a transfer of the decree to the Koilpatti court's file; but in so doing he appears to have overlooked the fact that at the date of his order an application for execution would apparently have been time-barred unless petitioner could claim the benefit of S. 14 of the Indian Limitation Act, a point which has not been considered. No transfer order should be made so as to evade the provisions of the Limitation Act or to validate an invalid application.

The District Judge's order must be set aside, and that of the District Munsif restored with costs to the Appellant throughout.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SADASIVA AIYAR AND MR. JUSTICE NAPIER.

Kamatchinatha Pillai .... *Appellant (Accused in Ramnad Session Case No 28 of 1918)*

Kamatchinatha Pillai In re.

Penal Code, Ss. 468, 471—Forgery for purpose of cheating—Using forged document as genuine—Offences of—Process server—Using false attakshi with forged signatures to defraud court—Conviction for offences under Ss. 468 and 471—Legality.

Where a process server prepared and filed into court a false attakshi with forged signatures with a view to defraud the District Munsif into excusing his delay in returning processes and his absence from duty for a period of seven days, *held* that he was rightly convicted of offences under Ss. 468 and 471 of the Penal Code.

Empress of India v. Jiwanand [1], *Queen Empress v Girdhari Lal* [2] doubted.

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* Crl. A. No 707 of 1918 — 7th January 1919.
Crl. R. C. No. 708 of 1918.

1. (1882) I. L. R. 5 A. 221.
2. (1886) I. L. R. 8 A. 653.

Kamatchinatha Pillai *In re.*

Appeal against the order of the Court of Session of the Ramnad Division in case No. 28 of the calendar for 1918 and the above revision case taken up for reversal of the conviction and sentence of the accused in the said Sessions case No. 28 of 1918.

Public Prosecutor for the Crown.

The court delivered the following

Judgment :—This is an appeal by a process-server of the court of the District Munsif of Dindigul who was convicted of forgery for the purpose of cheating and using as genuine a forged document and sentenced to six months' rigorous imprisonment under Ss. 468 and 471 of the Indian Penal Code.

The document in question is the *attakshi* Ex. H purporting to have been signed by the two karnams, Sivagurunatha Pillai (Prosecution 5th witness) and Athinarayana Mudali (Prosecution 6th witness) certifying that the appellant was ill of fever and cholera in prosecution 5th witness's village and between 23rd and 30th November 1917 and that the two karnams had him treated with medicines. The body of the *attakshi* is in the appellant's writing. The evidence including the depositions of prosecution 5th and 6th witnesses clearly establishes that prosecution 5th and 6th witnesses did not sign the attakshi Ex. H, that the peon was not in prosecution 5th witness' village between the 23rd and 30th November 1917 and that he was not treated with medicines by prosecution 5th and 6th witnesses in that village. Seeing that the appellant has not adduced any evidence (except the worthless testimony of defence 2nd witness a "resigned" head constable who says appellant told him one day ten months before the witness gave evidence that appellant was suffering from fever) to establish that he suffered from cholera and fever between 23rd and 30th November 1917, it is a very fair inference that the whole story of his illness for just the one week's time that he overstayed the period allowed to him to return his process is all a myth. There can be no question that the *attakshi* Ex. H was prepared by the appellant with the false signatures of prosecution 5th and 6th witnesses in order to defraud the District Munsif into excusing his delay in returning processes and the absence of the appellant from duty between the 24th and 30th November 1917.

Kamatchinatha Pilla *In re*

The decisions in *Empress of India* v. *Jiwanunni* [1] and *Queen Empress* v. *Girdhari Lal* [2] and other similar cases where false entries made to screen the accused from punishment for an offence already committed were held not to be offences are distinguishable and the soundness of those decisions is also doubtful, there being other decisions tending to support a contrary conclusion. See *Queen Empress* v. *Sabapati* [3] and *Emperor* v. *Rash Behari Das* [4].

The question whether the false signatures were placed in Ex. H also "dishonestly" need not be considered as they were clearly placed in Ex. H "fraudulently" according to the rule laid down by the majority of the Full Bench of this court in *Kotamraju Venkatarayadu* v. *Emperor* [5] and hence Ex. H was a forgery intended to cheat the District Munsif and was used by the appellant as a genuine document.

We affirm the conviction and sentence and dismiss the appeal.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SADASIVA AIYAR AND MR. JUSTICE SPENCER.

Venkatarama Sivan and another ... *Appellants** (*Plaintiffs*).

v.

The Secretary of State for India in Council represented by the Collector of Tanjore. ... *Respondent* (*Defendant*).

Venkatarama Sivan v. The Secretary of State for India.

Inam—Grant of whole village—Poramboke—Burning grounds—Rights of grantee— Ownership vested in Government in trust for communal purposes—Construction of "besides poramboke" in Inam title-deed.

Notwithstanding the grant of a whole village including poramboke, as a sarvamanyam inam the ownership of certain kinds of poramboke, *e.g.*, burning grounds temple sites, public roads etc, does not pass to the grantee but continues to vest in the Government as legal owner in trust for communal purposes The Government being the custodian of the right of the public in respect of these porambokes could not be deemed to have permanently assigned over such property to individuals for their private use without a derogation from the trust. The meaning by the words "besides poramboke" in the inam title deed should not

* S. A. Nos. 1401 and 1402 of 1917. 25th September 1918.

1. (1882) I. L. R. 5 A. 221
2. (1886) I L R. 8 A. 653.
3. (1888) I. L. R 11 M. 411.
4. (1908) I. L. R. 35 C. 450.
5. (1905) I. L. R, 28 M, 90.

Venkatarama Sivan v. The Secretary of State for India.

be understood as an acknowledgment by the Government of the Inamdar's title to all kinds of poramboke in the village.

Secretary of State for India v. *Raghunatha Thotachariar* [1], *Narayanaswami Naidu* v. *The Secretary of State for India* [2] Ref. to.

Second appeals against the decrees of the court of the Subordinate Judge of Kumbakonam in A. S. Nos. 229 and 230 of 1916 preferred against the decrees of the Court of the District Munsif of Valangiman at Kumbakonam in O. S. Nos. 347 and 348 of 1914.

T. R. Ramachandra Aiyar, G. S. Venkatarama Aiyar, S. Rangachariar and *S. Vaidyanatha Aiyar* for Appellant.

The Government Pleader for the Respondent.

The Court delivered the following

Spencer, J.

Judgments :—*Spencer, J* :—These second appeals are brought against the judgment of the Subordinate Judge of Kumbakonam confirming the judgment of the District Munsif of Valangiman dismissing two suits instituted against the Secretary of State for India in Council for the recovery of portions of poramboke land comprised in Survey No. 95/2 corresponding to paimash N. 809 in the village of Govindapuram from which the plaintiffs were evicted by order of Government officers under the provisions of Act III of 1905, and for damages for the unlawful felling of trees standing upon the said land.

The village of Govindapuram is a whole inam village granted in 1809 by Pratap Singh Rajah Saheb, one of the former rulers of Tanjore. The entire village was granted to the inamdars "in free tenure, exempt entirely from payment of revenue or rent," which is the meaning of sarvamanyam. The original grant is not available but we have the title-deed (Ex. E) issued by the Inam Commissioner in 1865, wherein the grantee's title was acknowledged by the Government to the sarvamanyam village of Govindapuram claimed to be of 84·15 acres of dry land, 216·15 acres of wet land and 54·29 acres of garden land besides poramboke. The portions alleged by the defendant to have been encroached upon by the plaintiffs are classed as Sudra *rudrabhumi* or cremation ground and the substantial question to be now decided is whether upon the construction of the grant these portions passed to the grantees under the words "besides poramboke".

1 (1912) 24 M. L. J. 31.

2 (1912) 24 M. L. J. 36.

Venkatarama Sivan v. The Secretary of State for India.

Spencer, J.

These words occurring in similar deeds of grant have been the subject of Judicial interpretation and in *Venkataratnammah* v. *Secretary of State* [1] Benson and Sundara Aiyar, JJ., laid down that the effect to be given to them must depend on the evidence available in each case and the circumstances attending the grant. In the case that they were then considering, they held that as the stream in question was not a large one and was not connected with any system of irrigation maintained by Government and as the British Government had shown no intention at any time to derogate from the original grant, the channel, must belong together with other poramboke to the inamdar. At the same time, the learned Judges cited the case of *Narayanaswami Naidu* v. *Secretary of State for India* [2] and expressed their concurrence with the view therein taken of the meaning of the words "besides poramboke," *i. e.*, that they should not be interpreted as an acknowledgment by the Government of India of the inamdar's title to all kinds of poramboke. In *Narayanasami Naidu* v. *Secretary of State for India* [2] Benson and Bakewell, JJ., observed that "it could never be supposed that the Government, in making a grant as a reward for services rendered included in the grant the property of private persons, or the communal property of the villagers such as temples, threshing floors, cattle-stands, *burning-grounds* or the like, or public roads, simply because they are included in the area of the village as shown in the village and survey accounts, and are not in terms excepted from the grant," In the village of Govindapuram we find from reference to the Inam Register, Ex. XX, that, the entire area of the village being 441 acres 25 cents, 354 acres 99 cents consisted, at the time when the register was written up, of wet and dry fields, topes and gardens leaving 86 acres 26 cents to be deducted for poramboke. Below this there is a note that the poramboke consists of houses and backyards about 44 acres 37 guntas and 5 annas in local measure, and pathways, roads, irrigation channels, tanks, river, sites of pagodas, burning-ground, etc.

Now as regards public roads the Government has divested itself of its rights over them by declaring them under S. 49 of the Local Boards Act (V of 1884) to be vested in the District Board, a statutory body constituted for the maintenance

1. (1912) I. L. R. 37 M 396 (f. n.) 2. (1912) 24. M. L. J. 86

Venkatarama Sivan v. The Secretary of State for India.

Spencer, J.

of roads and for other objects of public utility. As regards irrigation channels rivers and tanks, the beds would, under the authority of *Narayanaswami Naidu* v. *Secretary of State for India,* [1] ordinarily remain vested in the Government, which under Act VII of 1865 has the control of irrigation in this Presidency. Lastly as regards sites of pagodas, burning-grounds, etc., which word "etc," must also include public threshing-floors, cattle-stands, and unassigned house-sites and backyards, Government is the custodian of the rights of the public and could not be deemed to have permanently assigned over such property to individuals for their private use without a derogation from its trust. The legal title has all along been in the Government in respect of such communal land for the sake of convenience, and therefore the Government could, at the time of the grant, have assigned to the inamdar what rights it possessed in these sites ; but it could not have done so without a violation of its trust to the community to preserve the land for communal use, and I think that we should not assume, without clear proof, that the Government intentionally committed a violation of trust.

The Lower Courts were therefore right in dismissing these suits and as the second appeals fail on the merits, without deciding the question of limitation, they must be dismissed with costs.

Sadasiva Aiyar. J.

Sadasiva Aiyar, J.—In *Secretary of State for India* v. *Raghunatha v. Thatachariar* [2] I said at page 34: "The word 'Poramboke' is loosely used in many senses. Whatever land does not yield revenue to Government is usually known as poramboke though several kinds of lands may be included in it." So far as *Narayanaswami Naidu* v. *Secretary of State for India* [1] decided that burning and burial grounds, temple sites and public roads remain vested in Government in trust for communal purposes, notwithstanding the grant of a whole Inam village including the porambake, I concurred with that opinion respectfully in *Secretary of State for India* v. *Raghunatha Thatachariar* [2] and I still adhere to that opinion. So far as *Narayanaswami Naidu* v. *The Secretary of State* [1] decided that river porambokes and channel porambokes contained within the

1. (1912) 24 M. L. J. 36, 2. (1912) 24 M. L. J. 31.

Venkatarama Sivan v. The Secretary of State for India.

Sadasiva Aiyar, J.

ambit of a *Sarvamanyam* whole inam village did not pass to the inamdar by the grant, that opinion must be deemed to have been overruled by the recent decision of the Privy Council in the *Urlam case*. The present case, however, relates to burning-ground poramboke and that, in my opinion, continued notwithstanding the Inam grant of the village to vest in the Government *as legal owner in trust for communal purposes*. The legal ownership of Government as regards burial and burning ground porambokes and public-road-porambokes in Inam villages, is, no doubt, of a different character from its legal ownership of cultivable waste lands in ryotwari villages (legal ownership over the latter involving much larger powers of grant, auction-sale, ejectment, direct possession, subjection to various and indeterminate kinds of uses, etc., than their legal right of ownership in communal lands like burning grounds etcetera set apart for particular portions of the community) ; but both kinds of lands are the subject of the Government's legal ownership in a very real sense so far as trespassers are concerned. The contention of Mr. Ramachandra Aiyar, therefore, that the Sudra community is the legal owner even on the findings of the Lower Courts and that the Government had no right to eject his clients while his clients were in lawful possession, the Government being not the legal owner, cannot be upheld. The members of the Sudra community may form the objects of the trust but the trustee and legal owner is the Government itself. I therefore agree that the second appeals must be dismissed with costs.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SESHAGIRI AIYAR AND MR. JUSTICE PHILLIPS.

The Secretary of State for India v. Shitaramappa

The Secretary of State for India in Council represented by the Collector of South Canara ...*Appellant** (*Plaintiff*).

v.

Hosangadi Shitaramappa and others ...*Respondents* (*Defts*).

Mulgeni—Death of Mulgenidar without issue—His rights if escheat to Government or revert to mulgar.

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* S. A. No. 57 of 1917. 14th November 1918.

The Secretary of State for India. v. Shitaramappa.

The rights of a mulgenidar do not escheat to the Government on the death of the last owner dying without issue but revert back to the mulgar from whom the mulgeni was acquired.

Second appeal against the decree of the District Court of South Canara in A. S. No. 126 of 1915 preferred against the decree of the Court of the District Munsif of Kundapur in O. S. No. 535 of 1913.

The Government Pleader, for Government.

B. Sitarama Rao, K. Y. Adiya and *K. Sundara Rao*, for Respondents.

The Court delivered the following

Judgment :—The question in this case is whether the rights of a mulgenidar escheat to the Government on the death of the last owner dying without issue or whether it reverts back to the mulgar from whom the mulgeni was acquired. This question is not uncovered by any direct authority. If a mulgeni tenure is of the same character as a permanent lease, on the authority of the Judicial Committee in *Sonet Koer* v. *Himmut Bahadur* [1] the right would escheat to the Government and would not revert to the landlord. Therefore the question is what are the characteristics of a mulgeni tenure. In the Fifth Report Vol. II page 78 it is pointed out that on the death of the mulgenidar the right would revert to the mulgar just as the Mulgar's property would escheat to the Government in case he dies issueless. Similar observations are to be found in the Report of the Collector in the same report at page 481. The learned Government Pleader suggested that this is not a statement of fact but an inference from ideas relating to the feudal tenure. We are unable to agree with this contention. The Fifth Report was a collection of facts and statements laid before the House of Commons and there is no reason to suppose that the Collector and the other officers were influenced by feudal notions in making the above statements. In the minutes of Sir Thomas Munro at pages 71 and 79 a similar statement occurs. In *Timmarsa Puranik* v. *Badiya* [2] an extract is made from the Report of Mr. Chamier speaking on behalf of the Board of Revenue which also shows that the tenure would revert to the mulgar. Then there is an observation by

1 (1876) I. L. R. 1 C. 391. 2 (1865) 2 Bom. H. C. R. 66.

The Secretary of State for India v. Shitaramappa.

Mr. Justice Benson in *Vidyapurana Thirthaswami* v. *Ugganu* [1] wherein the learned Judge accepts the view contained in the earlier reports. That was a case in which the question was whether a mulgar or mulgenidar should pay the increased assessment levied by the Government. After the decision of the Full Bench, the Government of Madras collected opinions on the advisability of legislating on the question of increased assessment. In their final order which is G. O. No. 2154, dated 18th July 1912, the Government say with reference to mulgeni leases : "As long as the rent is paid, the tenant cannot be evicted and even when it is unpaid the landlord on evicting the tenant is liable for improvements which the tenant has made. On failure of heirs the tenant's interest ordinarily lapses to the landlord." Thus we have the opinion of a Collector, of the Board of Revenue, of that experienced administrator Sir Thomas Munro, of the Government and of the High Court in favour of the contention that an essential incident of mulgeni tenure is that on failure of heirs it lapses to the mulgar. In these circumstances the decision in *Sonet Koer* v. *Himmut Bahadur* [2] is not applicable to the present case. As pointed out by Mr. Sitarama Row that the view taken by Sir Charles Sergant in *Venkataraya Bin Ramkrishnappa* v. *Shivram Bhat* [3] and *Tamaya* v. *Timapa Ganapaya* [4] is also in favour of this view. It is true in those cases there was a condition restraining alienation. But it was held that such conditions were not void. If it were a permanent heritable tenure to which the landlord has no manner of right such a condition would be void under the general law as well as under S. 10 of the Transfer of Property Act. The fact that that condition was held not repugnant to the grant is another ground for holding that a mulgeni tenure should not be regarded as of the same character as a permanent lease. In *Parameshri* v. *Vittappa Shanbaga* [5] the view taken in 7 Bom. was accepted by Justice Bhashyam Aiyangar. *Nil Madhab Sikdar* v. *Narattam Sikhdar* [6] and *Ram Dihal Rai* v. *The Maharaja of Vizianagaram* [7] relied on by the Government Pleader do not take the case further than *Sonet Koer* v. *Himmut Bahadur* [2]. For these

1. (1910) I. L. R. 34 M. 231 at page 238.
2. (1876) I L R. 1 C. 391.
3. (1883) I. L R. 7 B. 256.
4. (1881) I. L. R. 7 B 262.
5. (1902) I. L. R. 26 M 157.
6. (1890) I. L. R. 17 C. 826.
7. (1908) I. L. R. 30 A 488.

The Secretary of State for India. v. Shitaramappa

reasons we are of opinion that the decision of the District Judge is right and that this appeal should be dismissed with costs to be paid in 3 months.

A. S. V.

PRIVY COUNCIL.

PRESENT :—LORD PHILLIMORE, SIR JOHN EDGE AND SIR LAWRENCE JENKINS.

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Rani Kuar Mani Singh Mandhata ... *Appellant.**

v.

Nawab of Murshidabad ... *Respondent.*

Rani Kuar Mani Singh Mandhata v. Nawab of Murshidabad

Limitation—disabilities entitling persons affected to extended period of limitation —Disqualification of proprietors under Court of Wards Acts—not a ground for extending period of limitation—Court of Wards Act, 1879 (*Bengal Act, IX of* 1879) *Ss.* 6, 9.

The Limitation Act (Act IX of 1908) recognizes and enumerates certain conditions as legal disabilities entitling the persons affected by them to an extended period of limitation. But this enumeration is exhaustive. The fact that a proprietor has been declared disqualified to manage his own property under a Court of Wards Act and thereby debarred from suing is not one of the recognised disabilities, and does not therefore suspend or modify the ordinary law of limitation.

Appeal from a decree of the Calcutta High Court (Fletcher and Teunon, JJ.) dated February 28, 1915, varying a decree of the Subordinate Judge of Midnapur.

The facts of the case are sufficiently stated in their Lordships' judgment. The sole question on this appeal was whether the Lower Courts were right in dismissing the plaintiff's suit, so far as it related to Killa Nazagram, as barred by limitation. The High Court's judgment on this question was as follows :—

" The next argument is as to whether the suit is barred by limitation as regards the lands comprised in the kabala of the 7th of June 1890. It is argued that as the plaintiff was a disqualified proprietor whose estate was under the charge of Court of Wards time did not run against her during the period the Court remained in charge.

" Under the terms of the Indian Limitation Act 1908 no other cause of disqualification than those mentioned in the Act can be admitted to save limitation. The only disqualifications that Sections 6, 8 and 9 of the Act recognise are minority, insanity and idiocy. It is argued that notwithstanding this when the plaintiff was declared a disqualified proprietor and the Court of Wards Act (Act IX of 1879 B. C.) vested the right of possession of her property in the Court of Wards

* 3rd December 1918.

P. C.
Rani Kuar Mani Singh Mandhata *v.* Nawab of Murshidabad

the possession of the defendant and his father could not become adverse as regards the plaintiff until the Court of Wards released the property of the plaintiff on the 1st of August 1911.

"This argument in substance rests upon the wording of S. 35 of Act IX of 1879. No doubt the words 'directing that possession be taken of such person and property' occur in that section. But the whole scheme of the Act as is manifest from many sections is the taking of the property of the disqualified proprietor under the charge of the Court of Wards. The position of the Court of Wards being that of a guardian of the disqualified proprietor, the possession of the guardian would be that of the ward and the plaintiff in that view was in possession when the Court sold the property in June 1890. Moreover, the Act preserves the right of suit of the disqualified proprietor. No one except the disqualified proprietor can bring a suit in relation to property taken charge of by the Court of Wards. It is true that by part VII of the Act restrictions have been placed upon the right of the disqualified proprietor to sue. The fact, however, remains that no one except the plaintiff could have maintained a suit with reference to the property taken charge of by the Court of Wards.

"I think, therefore, that the learned Judge came to a correct conclusion when he found that the plaintiff's suit as regards the properties comprised in the kabala of 7th of June 1890 was barred by limitation under Articles 91 and 142 of the Indian Limitation Act. I may mention in passing that the learned Vakil for the appellant informed us that he makes no case to bring the plaintiff's suit within S. 18 of the Indian Limitation Act, the case of the plaintiff being that she knew of the fraud all along and applied to the Court of Wards for release of her property in order to institute a suit." On appeal.

De Gruyther, K. C. and H. N. Sen, for appellant, submitted that plaintiff's claim was not barred by limitation. The widows were declared disqualified proprietors under S. 6 (a) of Act 9 (B. C.) of 1879 by an order dated July 30, 1886. The Court of Wards took possession on August 31, 1886. The ward then had no power to take possession or to maintain a suit against the Court of Wards itself or its vendee. A suit on behalf of such a ward is incapable of being prosecuted without the sanction of the Court of Wards, whose own acts would have been impeached, *Kumar Biseshvar Roy* v. *Kumar Shoshi Shikareshvar Roy.* [1]

Limitation does not run against a person who cannot sue to recover possession. So far as plaintiff was concerned the dispossession was not in 1890, but in 1886. The property was in *custodia legis.* While plaintiff was not legally competent to recover possession of it,

1. (1889) L. R. 17 I. A. 5

P. C.

Rani Kuar Mani Singh Mandhata v. Nawab of Murshidabad.

time did not begin to run against him. *Contra non valentem agere non currit praescriptio. Tukaram* v. *Sujangir Gur.* [1]

Dunne, K. C., and Kenworthy Brown, for respondent, submitted that there was no estate vested in the Court of Wards. Their possession was as agents for Plaintiff. They were in the same position as a receiver. The Limitation Act provides certain conditions for the extension of the period of limitation, but the condition suggested by appellant is not one of them.

De Gruyther, K.C., replied.

Their Lordships' judgment was delivered (December 3, 1918) by

Sir Lawrence Jenkins.

Sir Lawrence Jenkins:—Raja Prithwi Nath Singh Mandhata died on the 4th October, 1882, without male issue and was succeeded by his two widows. At his death he was heavily indebted and on the 1st March, 1886, the widows presented a petition to the Commissioner of their division praying that he would recommend the Court of Wards to take charge of the estate. On the 30th July, 1886, the Court of Wards under S. 27 of the Court of Wards Act, 1879, declared the widows to be disqualified proprietors under S. 6 (a) of the Act, and by the same order declared under S. 35 that it had determined to take under its charge the property of the widows and directed that possession be taken of the property on behalf of the Court.

On the 7th of June, 1890, a part of the property called Killa Nazagram was sold to the defendant's father and predecessor-in-title, and the transfer was executed by the Collector. The purchaser obtained possession admittedly not later than the 30th April, 1891. The defendant's father subesquently obtained a transfer of two villages called Pirote and Sukdubi, and this was executed by the Collector on the 11th February, 1901.

On the 1st of August, 1911, the Court of Wards withdrew from the charge of the property. On the 31st May, 1912, the surviving widow instituted this suit impugning the two sales and transfers and praying that she might be restored to possession. At the first hearing 16 issues were framed.

The fight was whether the suit was barred by limitation. On the defendant's application under O. XIV, R. 2 of the Civil Procedure Code the Court tried this and two other issues first

1. (1884) I. L. R. 8 Bom. 585.

P. C.

Rani Kuar Mani Singh Mandhata v. Nawab of Murshidabad.

Sri Lawrence Jenkins.

and disposed of the suit as barred by limitation. On appeal the High Court set aside the decree of the first Court in so far as it related to the villages Sukbudi and Pirote comprised in Kabala of the 11th February, 1901, and ordered that the case be remanded to that Court to be dealt with according to the directions contained in the High Court's judgment, but in other respects affirmed the decree then under appeal.

From the High Court's decree the present appeal has been preferred. Though the grounds of appeal attack the procedure adopted at the trial the argument before this Board has been limited to the question whether the plaintiff's claim to the properties comprised in the transfer of the 7th June, 1890, is barred by limitation.

The purchaser's possession began not later than the 30th of April, 1891, so that at the date this suit was instituted the defendant and his father, from whom he derives his liability to be sued, had been in possession of the property on the strength of their title more than 21 years. It is, however, contended that time did not run against the plaintiff during the period that the Court of Wards was, as it has been termed, in possession, and to lend the greater force to this contention it is argued that a disqualified proprietor has no right to sue so long as the property remains in charge of the Court of Wards. This curtailment of the rights of a disqualified proprietor depends on the provisions contained in Part VII of the Court of Wards Act. To meet this objection the Subordinate Judge held that the plaintiff came within clause (e) of S. 6 of the Act, and so was unaffected by the restrictive provisions of Part VII. But this view cannot be supported : clause (e) had not been enacted when the widows were declared disqualified to manage their own property, and this declaration was expressly based on clause (a) of the section. But while this ground of decision is misconceived, the plea of limitation has been rightly held a bar to the suit so far as it relates to the property comprised in the transfer of 7th June, 1890.

Before that transfer and until the purchaser acquired possession under it the plaintiff and her co-widow were in possession of the property, and none the less because it was in the charge of the Court of Wards This possession was discontinued, and the possession of the defendant's father began

P. C.

Rani Kuar Singh Mandhata v. Nawab of Murshidabad.

Sir Lawrence Jenkins

as a result of that transfer, and was continued without interruption for a period far in excess of the statutory limit of 12 years, first by the father and then by the defendant, his son, each claiming as of right and on his own behalf adversely to the plaintiff. These facts, standing alone, present a complete bar to the suit so far as it seeks the restoration of this part of the suit property ; nor is the position altered because the plaintiff was a disqualified proprietor until the first August, 1911. The Limitation Act, it is true recognizes and enumerates certain conditions as legal disabilities entitling the persons affected by them to an extended period of limitation. But the plaintiff's disqualification under S. 6 (a) of the Court of Wards Act is not one of them, nor has any case been made which could suspend or modify the ordinary law of limitation as applicable to this case. The objection taken in argument has been directed not to that part of the High Court decree which ordered a remand, but to so much of it as affirmed the decree of the Subordinate Judge, and discussion at the Bar has been confined to the plea of limitation. Their Lordships, therefore, are not called on to consider any other question which may affect this litigation, and they wish to guard themselves against being supposed to have decided either directly or inferentially anything beyond that particular plea.

From the view they take of this plea it necessarily follows that this appeal fails, and they will therefore humbly advise His Majesty that it should be dismissed, and the appellant must pay the cost of this appeal.

Solicitors for Appellant:—*T. L. Wilson & Co.*

Solicitors for Respondent :—*G. C. Farr.*

A. P. P.

PRIVY COUNCIL.

PRESENT:—LORD BUCKMASTER, LORD DUNEDIN AND SIR JOHN EDGE

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Musammat Jeuna Bahu and others ... *Appellants.**

v.

Rai Parmeshvar Narayan Mahtha Rai Bahadur and others ... *Respondents.*

P. C.

Musammat Jeuna Bahu *v.* Rai Parmeshvar Narayan Mahtha Rai Bahadur.

Mortgage decree—Recovery of balance over and above nett proceeds of sale of mortgaged property—Personal decree for balance—Whether sale must take place before passing such decree—Transfer of Property Act, 1882 (*Act IV of* 1882) *S.* 90.

It is not a condition precedent to the power of decreeing payment of the balance under S. 90 of the Transfer of Property Act, 1882, that the mortgaged property must first be sold and found insufficient to satisfy the debt. The section is complied with when the Court passes a decree that, on the happening of the event when the nett proceeds of the sale are found to be insufficient, the balance should be paid.

Appeal from a decree of the Calcutta High Court (Sarada Charan Mitra and Bell, J J.), dated May 19, 1908, affirming a decree of the Subordinate Judge of Mozufferpore.

The facts so far as material to this appeal are sufficiently stated in their Lordships' judgment. The suit was brought by Appellant to set aside a sale held in 1891. It was dismissed by both the Lower Courts. Before the High Court the main ground of appeal was that the properties had already been sold in execution and that such sale, though ultimately set aside, was still in force when they were sold under the present decree. As to this the High Court observed as follows:—

"As regards the second ground, reliance has been placed on the decision of this Court in *Prangour Majumdar* v. *Hemanta Kumari Debi* [1]." The facts of that case are somewhat similar to the facts of the present case. It appears that the respondent Hemanta Kumari had obtained two decrees for rent in execution of one of which she sold the property in dispute in that case. During the pendency of the proceedings to set aside the sale and before confirmation thereof she caused the sale of the same property under her second decree. The Court held that the second sale was void and ineffectual, and, therefore, should be set aside. It is contended before us that the same principle should apply to the present case and that, as long as the proceedings for setting aside the sale at the instance of

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* 17th October 1918.

1. (1886) I. L. R. 12 C. 597.

P.C.

Musammat Jeuna Bahu v Rai Parmeshvar Narayan Mahtha Rai Bahadur.

Tripe were not concluded in favour of the judgment-debtor, these properties could not be sold at the instance of Thomas & Co. We are of opinion, as has been pointed out in the later case of *Premchand Pal* v. *Purnima Dasi* [1], by one of the learned Judges who had decided the above case, that the decision in that case rested on an application of the law as laid down in S. 316 of Act X of 1877 before it was amended by Act of 1879. Mr. Justice Beverley, in the later case of *Premchand Pal* v. *Purnima Dasi* [1] in which he with his learned colleague, practically differed from the principle laid down in case of *Prangour Majumdar* v. *Hemanta Kumari Debi* [2] said, " But as one of the Judges who decided the case "of *Prangour Majumdar* v. *Hemanta Kumari Debi* [2] . I wish to say that "that case appears to havebeen argued and decided on the supposition that it was governed by S. 316 of Act X of 1877 before that section was amended by Act XII of 1879". The rule of Law as laid down in Act X of 1877 as also the decision before the amending Act of 1879 was passed was that the title of the purchaser accrued from the date of the sale and not from the date of the confirmation of the sale as laid down by the amending Act of 1879. If that was so-and that was undoubtedly the law before 1879 —the law which was applied in the case of *Prangour Majumdar* v. *Hemanta Kumari Debi* [2] purchaser at the second sale obtained no title. There was nothing to sell. But under the amending Act XII of 1879 and Act XIV of 1882, the title of the purchaser dates from the date of the confirmation of sale. The sale in execution, therefore, did not of itself vest in the purchaser a right to the property. The right to the property continued in the judgment-debtor whose property was sold until confirmation and there is no reason why, under the present Code, *i.e.*, S. 316 of Act XIV of 1882, we should hold that there was nothing which could be sold in the execution of the decree of Thomas & Co.

We are also of opinion that, though the sale of the 15th December 1892 might be irregular and though the Court in which the execution proceedings were being carried on should have, on the application of Mahbub, directed a stay of the sale until the result of the proceedings to set aside the previous sale was known, it was merely an irregularity. The sale could not be held to be a nullity. In *Tassadug Rasul Khan* v. *Ahmad Hossein*, [3] the Judicial Committee of the Privy Council, in a case in which the rule laid down in S. 290 of the Code had been violated, held that the sale in contravention of the rule of procedure was not a nullity, but was merely an irregularity and that such irregularity would be cured by the confirmation of sale.

1. (1888) I. L. R. 15 Cal. 546. 2. (1886) I. L. R. 12 Cal. 597

3. (1893) I. L. R. 21 Cal. 66 (P. C.)

At all events, the person affected by the irregularity of such a description was bound to come within one year as held by the same Judicial Committee in *Malkerjan v. Narhari* [1]. The judgment-debtor could have come under S. 311 of the Code or instituted a suit within one year as contemplated by S. 12 (a) of the Limitation Act, if he was not barred under S. 244 of the Code. The Court in which the sale took place had jurisdiction to cause the sale and, though there might have been an irregularity, the parties affected by it could have recourse to means of relief prescribed by law. In the present case the suit was instituted about 12 years after the sale.

Our attention has been drawn to two cases in which a different view appears to have been taken, namely, of *Dagdu* v. *Pamcham Singh Gangaram* [2] and *Adar Chander Banerji* v. *Aghore Nath Aroo.* [3] The facts of the case in the Bombay Court are distinguishable from the facts in the present case. The learned Judges who decided that case rested their judgment not on the ground of nullity of the sale, but on another ground altogether, though reference was made during the argument to *Prángour Majumdar* v. *Hemanta Kumari Debi* [4]. The case in *Adar Chander Banerji* v. *Aghore Nath Aroo* [2] was one for damages and the suit was instituted by the purchaser after the confirmation of sale. These cases cannot, therefore, be held as authority for the proposition contended for by the learned Counsel for the plaintiff. The second ground must therefore also fail.

On the present appeal.

De Gruyther, K.C. and *Dube* for appellants other than Ram Dei: The sale did not comply with the provisions of the Transfer of Property Act. There was no decree made under S.90 for the sale of property other than the mortgaged property. It is true the decree provided that if the sale proceeds be not sufficient to cover the whole of the decretal amount the plaintiff would be entitled to recover the balance from the judgment-debtor's estate: but a decree has to be passed after the sale has taken place: and by law there can be no joint decree under Ss. 89 and 90.

Secondly, the property had already been sold by the Court in execution and the application to set that sale aside had not been determined when the second sale in question took place. The decree-holder was not a party to the application to set aside the first sale. There were no legal grounds for setting it aside and the Court had no power to set it aside under S. 311 of the Code of Civil Procedure

1. (1900) L.R. 27 I.A. 216=25 Bom. 337.
2. (1892) I. L. R. 17 Bom. 375.
3. (1898) 2 C. W. N. 589.
4. (1885) I. L. R. 12 Cal. 597.

P. C.

Musammat Jeuna Bahu v. Rai Parmeshvar Narayan Mahtha Rai Bahadur.

except on such grounds. The fact that the first sale was never confirmed is immaterial, as also is the fact that the second sale was confirmed.

Parikh, for appellant Ram Dei.

Sir Erle Richards, K. C. and *Kenworthy Brown* Counsel for respondents were not called on.

Their Lordships' judgment was delivered (December 3, 1918.) by

Lord Buckmaster

Lord Buckmaster.—In this case the appellants challenge the validity of an execution sale of a 16-anna share in certain mouzahs appertaining to Mahal Sonkarsa. The sale took place on the 15th December, 1891, pursuant to an order of attachment of the 5th November, 1891, issuing out of the court of the Subordinate Judge of Mozufferpur, and made in execution of a decree of the same court passed on the 17th April, 1890.

There are two grounds upon which this case rests: the first that the decree of the 17th April, 1890, was, so far as it formed a foundation for the sale of this property, *ultra vires*; and, secondly, that at the date of the sale there was, in fact, another order existing for the sale of the same property. For reasons that their Lordships will state, they think there is no efficacy in either of these contentions.

The facts that preceded the litigation out of which this appeal has arisen are very simple, though they have been the cause of many legal complications. On the 24th March, 1888, Bal Krishan Lal Sand entered into a bond in favour of the members of the firm of Thomas & Co., to secure repayment of sums advanced to him by them up to the limit of Rs. 55,000; and, to secure this repayment, entered into a covenant to execute in their behalf a full and complete mortgage of the block and crop of the Buriarpur indigo concern.

Bal Krishan Lal died a month after the execution of this deed on the 24th April, 1888, leaving a son by his first wife, his second wife (the appellant, Musummat Jeuna Bahu, his widow), and four illegitimate children by a Mahommedan concubine.

Questions arose about the right to obtain letters of administration to the estate of Bal Krishan, which are irrelevant to the present dispute, and on the 30th May, 1889, letters of administration were granted to Mahbub Lal, the eldest of the illegitimate sons. On the 10th September, 1889, proceedings were

P. C.

Musammat Jeuna Bahu v. Rai Parmeshwar Narayan Mahtha Rai Bahadur.

Lord Buckmaster

taken by the firm of Thomas & Co., against Mahbub Lal as administrator of Bal Krishan Lal, claiming as equitable mortgagees upon the block and crop of the said indigo concern, by virtue of the deed of the 24th March, 1883, and asking for sale of the property, and application of the purchase money in or towards satisfaction of the sum of Rs. 17,432, the amount then due upon the mortgage, together with interest and costs.

The decree asked for was made on the 17th April, 1890, and in addition to granting the necessary relief under the mortgage, it further provided that, if the proceeds of the sale were not sufficient to cover the amount secured by the mortgage with interest till the date of realisation, the defendant should pay the balance of the amount from the estate of the deceased, and if the assets were not admitted to be sufficient, the estate should be kept under the management of the Court.

The sale of the mortgaged property took place on the 18th August, 1891, when it was sold for Rs. 7,000, the amount realised being obviously insufficient to clear the debt. On the 29th August, 1891, Thomas & Co., further applied in execution of their decree for attachment and sale of the mouzahs in dispute in this suit, and on the 5th November, 1891, attachment was accordingly ordered, and the sale took place on the 15th December of the same year.

On the 5th April, 1904, the widow instituted the suit giving rise to this appeal in the Court of the Subordinate Judge in District Tirhut against the purchasers and other parties asking, together with other relief not now material, to set aside the sale. In this she failed, though on other points she succeeded, and the decree giving effect to the judgment of the Subordinate Judge was drawn up and dated 31st January, 1906.

Against this decree the plaintiff appealed to the High Court of Calcutta, as also did certain of the defendants. The High Court on the 19th May, 1908, heard both appeals together, and dismissed them both. The defendants have taken no further steps in the matter; but the plaintiff appealed to this Board. She died on the 12th September, 1910, and the appeal has been continued by those who represent her original interest in the property. The respondents are the administrator of Bal

P. C.

Musammat Jeuna Bahu v. Rai Parmeshwar Narayan Mahtha Rai Bahadur.

Lord Buckmaster.

Krishna Lal and the representatives of the purchasers and the mortgagees.

Possibly as the result of deaths, or it may be for other reasons which their Lordships cannot ascertain, but which certainly are not in any way associated with the lack of despatch of business before this Board, the appeal now comes on for hearing ten years after the date of the decree of the High Court. The ground upon which the sale is disputed is that by virtue of S. 90 of the Transfer of Property Act, 1882, the decree of the 17th April, 1890, was inoperative so far as it ordered payment of the balance of the moneys and formed a foundation for the sale of property outside the mortgage. This argument turns on the language of the section, which is in these terms:—"When the nett proceeds of any such sale are insufficient to pay the amount due for the time being on the mortgage if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such sum."

The appellants contend that the opening words establish as a condition precedent to the power of decreeing payment of the balance that the mortgaged property must first be sold and found insufficient to satisfy the debt. It is admittedly a strict and technical construction of the statute and one for which no reason can be assigned, and from which no advantage can possibly be derived by any mortgagor. It would be unfortunate if the statute by its terms rendered necessary the adoption of this contention; but in their Lordships' opinion it is not necessary so to construe the Act. The words of the section are, in their opinion, satisfied in cases where the Court passes a decree that, on the happening of the event when the nett proceeds of the sale are found to be insufficient, the balance should be paid. The order, though made at the time of the decree for the sale of the mortgaged estate, operates at a future date, and is made in such terms that it can only operate when the sale has failed to satisfy the debt, and this is the event specified and defined in the section as the event when the decree can be made.

Their Lordships, therefore, think that the first ground is untenable. The second contention depends on this, that on the 18th August, 1891, the same property was purchased at an execution sale under a decree held by one J. Tripe. No

P. C.

Musammat Jeona Bahu v. Parmeshwar Narayan Mahtha Rai Bahadur

Lord Buckmaster.

certificate of sale was issued in respect of the purchase, and on the 11th March, 1892, the purchasers framed a petition stating that they were not prepared to support the sale in question, and upon this petition on the 31st March, 1892, the sale was set aside.

The High Court dealt effectively with the contention that in these circumstances there was nothing that could be sold on the 15th December, 1891, and to their judgment their Lordships have nothing to add; but the appellants further say that under S. 311 of the Code of Civil Procedure, the former sale could not be set aside unless the applicant could prove to the Court that he had sustained substantial injury by reason of the irregularity by which the sale was impeached, and of this there was no evidence and nothing to show that the proper parties were before the Court. But the order setting the sale aside was not appealed from, and the appellants, on whom the burden of challenging the order rests, have completely failed to satisfy their Lordships that it was not duly and properly made in the presence of all the interested parties.

Their Lordships, therefore, have no hesitation in holding that the second ground of this appeal fails equally with the first.

Finally their Lordships regard it as their duty once more to direct attention to the unsatisfactory conditions which this case discloses relating to Indian litigation. The sale challenged was an ordinary execution sale that took place twenty-seven years ago. The proceedings culminating in this appeal began on April 4th, 1904, and it has taken over fourteen years before they have been finally concluded, and the purchaser confirmed in his holding. That the delay may in part have been occasioned by deaths is both true and obvious, for the allotted span of human life is not long enough to enable a group of adult people to contemplate with reasonable certainty a prolongation of life sufficient to see the end of such litigation. Security of title and reasonable swiftness of legal decisions are essential conditions of commercial development, and both are lacking in such a case as the present, a case which, in their Lordship's experience, unfortunately does not stand alone.

Musammat Jeuna Bahu v. Parmeshwar Narayan Mahtha Rai Bahadur.

They will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for Appellants other than *Ram Dei*: *T. L. Wilson and Co.*

Solicitors for Appellant *Ram Dei*:—*E. Dalgado.*

Solicitors for Respondents:—*Orr Dignam and Co.*

A. P. P.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE COUTTS TROTTER AND MR. JUSTICE KUMARASWAMI SASTRI.

Aiyalam Kesava Chetti ... *Appellant** (*Plaintiff*).

v.

The Secretary of State for India in Council represented by the Collector of North Arcot. *Respondents* (*Defendants*).

Kesava Chetti v. The Secretary of State for India.

Madras Land Encroachment Act (III of 1905) Ss. 3, 7, and 14—Penal Assessment—Imposition—Notice—Collection—Suit for declaration of title and that land is not liable to penal assessment—Limitation—Starting point—"Levied" in S. 14—meaning of—Marginal notes to Sections—Construction of Act.

The word "levied" in S. 14 of Madras Act III of 1905 means "collected" and the period of limitation in S. 14 runs from the date when the assessment or penalty is actually collected and not when it is merely imposed.

The Secretary of State for India v. Assan [1] referred to.

It is now well settled that marginal notes to sections of an Act of the Indian Legislature cannot be referred to for the purpose of construing the Acts.

Thakarain Balraj Kunwar v Rae Jagapat Pal Singh [2] followed.

Second Appeal against the decree of the Court of the Temporary Subordinate Judge of Vellore in A. S. No. 36 of 1917 (A. S. No. 220 of 1916 District Court, North Arcot) preferred against the decree of the Court of the Principal District Munsif of Vellore in O. S. No. 51 of 1915.

K. Ramanatha Shenai for Appellant.

The Government Pleader for Respondent.

The Court delivered the following

Kumaraswami Sastri, J.

Judgment:—*Kumaraswami Sastri, J*:—The plaintiff is the appellant. He sued the Secretary of State for India in Council (Respondent) for a declaration that the property speci-

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* S. A. No. 2101 of 1917. 21st November 1918.

1. (1915) I. L. R. 39 M. 727=30 M. L. J 255.

2. (1904) 31 I. A. 132; I. L. R. 26 A. 393

Kesava Chetti v. The Secretary of State for India

Kumaraswami Sastri, J.

fied in the plaint belongs to him and is not liable to penal assessment, for an injunction restraining the defendant from interfering with the property and for refund of the penal assessment levied. The case for the plaintiff is that the property belongs to him absolutely and was never the property of the Government, that he was served with a notice from the Revenue Divisional Officer dated 15th July, 1914 purporting to be issued under Madras Act III of 1905, levying a penal assessment of Rs. 10 and that the amount was wrongly collected from him on the 21st July, 1914. The defence is that the property was Nattam Poramboke which the plaintiff trespassed upon, that the Government is entitled to levy the assessment claimed and that the suit is barred by limitation.

Both the District Munsif and on appeal the Subordinate Judge held that the suit was barred by limitation as it was brought more than six months after the 15th July, 1914, the date of the notice of the Divisional Officer informing the plaintiff that an assessment of Rs. 10 was levied owing to his having encroached on Government property.

The question raised in this Second Appeal is whether the period of six months specified in S. 14 of the Madras Land Encroachment Act III of 1905 is to be computed from the date of the imposition of the assessment or the date when it is actually collected from him.

S. 14 of the Act provides that Civil Courts shall not take cognizance of any suit instituted by persons aggrieved by any proceedings under that Act unless the suit is instituted within 6 months from the date of the cause of action. The explanation to the section states that the cause of action in respect of any assessment or penalty shall be deemed to arise "on the date on which such assessment or penalty was levied." As regards eviction or forfeitures the cause of action is said to arise on the date of eviction or forfeiture.

Both the Lower Courts have erred in construing S. 14 with reference to the marginal notes to Ss. 3, 5 and 7 of the Act. It is now well settled that marginal notes to sections of an Act of the Indian Legislature cannot be referred to for the purpose of construing the Act. The view taken in *Punardeo Narain Singh* v. *Ram Sarup Roy* [1] and *Emperor* v. *Alloomya Husan* [2]

1. (1918) I. L. R. 25 Cal. 858 2. (1918) I. L. R. 28 Bom. 120. at p. 112.

Kesava Chetti v The Secretary of State for India.

Kumaraswami Sastri, J

has been affirmed by their Lordships of the Privy Council in *Thakarain Balraj kunwar* v. *Rai Jagpatpal Singh* [4] where Lord Macnaghten observed as follows :—" It is well settled that marginal notes to the sections of an Act of Parliament cannot be referred to for the purpose of construing the Act. The contrary opinion originated in a mistake and, was exploded long ago. There seems to be no reason for giving to the marginal notes of an Indian Statute any greater authority than the marginal notes in an English Act of Parliament." The marginal notes do not throw much light on the question. It is significant that while the marginal notes to S. 3 and 9 would suggest that "levy" was used in the sense of 'imposition' that marginal note to S. 15 uses the word in the sense of " collection." In the body of the Act the word " levy " is only used in S. 13 and obviously means " collected " as the clause provides that if any penalty has been levied from any person under S. 5 no similar penalty shall be levied under any other law.

I am of opinion that the word " levied " in S. 14 means " collected " and that the period of limitation in S. 14 runs from the date when the assessment or penalty is actually collected and not when it is merely imposed. The decision of the revenue officer under S. 3 of the Act to impose assessment, need not be on notice to the party as S. 7 of the Act requires notice to be given only when it is decided to impose a penalty or eviction or forfeiture of crops. As the explanation to S. 14 refers to both assessment and penalty it is difficult to see how a mere decision of the revenue officer to levy assessment can cause time to run against the person aggrieved. If " levy " simply means " imposition " time will begin to run before the person on whom it is imposed has any notice of the demand and if the fact that assessment has been imposed comes to his knowledge 6 months afterwards he would be without any remedy.

As regards the recovery of the sum actually paid plaintiff's cause of action can only arise after he has paid it and there is no reason why he should go to Court before he is actually damnified by the amount being recovered from him. Nor is he bound to file a suit to declare his title to the property or for an

1 (1904) L R 31 I. A. 132=L. R 26 A. 393.

Kesava Chetti v. The Secretary of State for India.

Kumaraswami Sastri, J.

injunction until the Government take some steps to eject him and the mere imposition of assessment or fine if unaccompanied by any steps taken to evict him under the powers conferred by S. 6 of the Act would not affect his possession; Under clause (b) of the explanation to S. 14 a person's cause of action arises in respect of eviction or forfeiture from the date of the eviction or forfeiture and not when the Collector issues the order directing his eviction and there seems to me no reason why in the case of assessment or penalty his cause of action should be deemed to have arisen on the mere imposition of the assessment or penalty and not on payment.

Reference has been made to the *Secretary of State for India* v. *Assan* [1] where it was held that a notice under S. 7 of the Act gives rise to no cause of action. It appears from the facts of that case that the assessment was actually collected six months before the suit and all that was decided was that the suit for declaration of title would be barred if the remedy to recover the assessment paid was barred under S. 14 clause (*a*) of the Act. It is no authority for the view that the starting point of limitation is the imposition and not the actual collection of the assessment or penalty. On the contrary the fact that his right to ask for a declaration of title would be barred if his remedy in respect of the assessment or penalty is barred is in my opinion a good reason for holding that payment and not mere demand gives rise to the cause of action.

As the penal assessment was paid on the 21st July 1914 the suit is in time having been filed within six months from that date.

I would reverse the decrees of both Courts and remand the suit for disposal to the District Munsif for trial on the other issues. Appellant will be entitled to a refund of Court Fees. Costs will abide and follow the result

Coutts Trotter, J.

Coutts Trotter, J.—I agree and have nothing to add.

N. V.

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1. (1915) I. L. R. 39 Mad. 727 : 30 M. L. J. 255.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR JOHN WALLIS, KNT., CHIEF JUSTICE AND MR. JUSTICE NAPIER.

The Municipal Council of Cocanada *Appellant** (*Defendant.*)

v.

The "Clan Line" Steamers Ltd., a Company incorporated under the English Companies Act 1862 to 1888 and having their registered office at No. 109, Hope Street, Glasgow, Scotland, represented by Gordon Woodroffe & Co., Madras. *Respondents* (*Plaintiffs*)

The Municipal Council of Cocanada *v.* The "Clan Line" Steamers Ltd.

Madras District Municipalities Act (IV of 1884) S. 53—Profession tax levy of—Carrying on business within the municipality, what constitutes.

The Clan Line Steamers Ltd, an incorporated company having their registered office and principal place of business in Glasgow, owned a line of steamers plying between English ports and the East. The Clan Line Steamers called at Cocanada in the Godavari District, to take in cargo for Europe and also to unload cargo consigned to Cocanada of which there was very little. They were represented at Cocanada by Messrs Ripley & Co., sub agents engaged by Messrs Gordon Woodroffe & Co., the Clan Line's agents at Madras. Ripley and Co., had no authority to contract with shippers at Cocanada for the allotment of cargo space, applications for which were usually made to Gordon Woodroffe & Co., at Madras. If, however, the shippers applied to Ripley & Co., the latter forwarded the application to be dealt with by Gordon Woodroffe & Co., or took their instructions by telegraph if time was short. Ripley & Co, issued shipping orders to shippers who had secured space, signed the bills of lading in advance, settled the bills of the dubash employed by Gordon Woodroffe & Co., to supply the ship with necessaries and paid the doctor who was similarly employed. Ripley & Co., also collected any freight that might be payable on the small quantity of cargo, landed at Cocanada. *Held*, that the activities of the Clan Line Steamers Ltd. at Cocanada did not amount to such an exercise of their trade or carrying on business within the municipality as to make them liable to pay profession tax in Cocanada under S. 53 of the Madras District Municipalities Act.

Grainger and Son v Gough [1], *Lovell and Christmas Ltd, v. Commissioner of Taxes* [2], Relied on.

Decision of Coutts Trotter, J., in *The Clan Line Steamers Ltd., v. The Municipal Coucuil of Cocanada* (See 34 M. L. J. 145), affirmed.

On appeal from the judgment of the Hon'ble Mr. Justice Coutts Trotter dated 2nd November 1917 passed in the exercise of the Ordinary Original Civil Jurisdiction of this Court in C. S. No. 219 of 1917.

* O. S. A. No. 2 of 1918. 8th November 1918.

1. (1898) A. C. 325
2. (1908) A. C. 46

Messrs. Venkatasubba Row and *Radhkrishnaih* for Appellant.

D. Chamier instructed by Messrs. King and *Partridge* for Respondent.

The Court delivered the following

The Municipal Council of Cocanada *v.* The "Clan Line" Steamers Ltd.

Wallis, C. J

Judgments :—*The Chief Justice* :—The question in this appeal is whether the Clan Line of Steamers, who have their Registered Office in Glasgow, are liable under S. 53 of the Madras District Municipalities Act, 1884, to pay profession tax in Cocanada on the ground that they are persons exercising within that municipality one of the professions, trades or callings specified in the schedule, which includes persons "carrying on business as a company," and also "ship-owners." The Clan Line Steamers call at Cocanada to take in cargo for Europe, and also unload there any cargo consigned to Cocanada, of which there is very little. They are represented in various matters by Messrs. Ripley & Co., sub-agents engaged by Messrs. Gordon Woodroffe & Co., the Clan Line's agents at Madras. Messrs. Ripley have no authority to contract with shippers for the allotment of cargo space under letters of engagement such as are now common. Shippers apply direct to Gordon Woodroffe & Co., if they apply to Messrs. Ripley the latter forward the application to be dealt with by Gordon Woodroffe & Co., or take their instructions by telegraph if the time is short. They issue shipping orders to shippers who have secured space, sign the bills of lading for cargo shipped, and receive the freight where it is payable in advance, as it is in all cases where the goods are consigned to London for transhipment to America. They also settle the bills of the dubash who is employed by Gordon Woodroffe & Co., to supply the ships with necessities, and pay the doctor who is similarly employed. They apparently collect any freight that may be payable on the small quantity of cargo landed.

Having regard to these facts, it may be said that in one sense the Clan Line carry on business at Cocanada through Messrs. Ripley, but what we have to see is whether it is such an exercise of their trade or carrying on business within the municipality as to bring the case within the language of the statute, which is indistinguishable from that of similar taxing Acts both in England and the Colonies. Those cases have been reviewed by the learned Judge and have again been considered

The Municipal Council of Cocanada v. The "Clan Line" Steamers Ltd.

Wallis, C. J

by us, but it is unnecessary to go behind the decision of the House of Lords in *Grainger and Son* v. *Gough* [1] and the more recent decision of the Privy Council in *Lowell and Christmas Ltd.,* v. *Commissioner of Taxes* [2]. In *Grainger and Son* v. *Gough* [1] the fact that Louis Roederer, who carried on business at Rheims in France, employed an agent and a large number of sub-agents in England to canvass for orders for his champagne, which were sent to Rheims for acceptance, was held not to make him a person exercising a trade within the United Kingdom, even when coupled with the further facts that the agents in England sometimes received the price of the goods sold for transmission to their principal, and that the principal's name appeared in the London Directory as carrying on business at 21 Mincing Lane, London. Lord Herschell, L. C. pointed out that in previous cases of this nature where liability was established, the contracts of sale had been habitually made in the United Kingdom, and observed that there was a broad distinction between trading *with* a country and carrying on a trade *within* a country, and that it was impossible to say that merchants and manufacturers who export their goods to all parts of the world exercise or carry on their trade in every country in which their goods find purchasers. A wine merchant, he said, exercised his trade by making or buying wine and selling it again with a view to profit and, if all he did was to solicit orders in England, he could not be said to exercise his trade there.

Lord Watson reviewed the earlier decisions and observed. "There may, in my opinion, be transactions by or on behalf of a foreign merchant in this country so intimately connected with his business abroad that without them, it could not be successfully carried on, which are nevertheless insufficient to constitute an exercise of his trade here within the meaning of Schedule D." He referred in this connection, as did Lord Davey, to *Sulley* v *Attorney General* [3] where it was held that the purchase of goods in England, by a branch of an American firm established there, of goods which it is intended to re-sell at a profit in New York, "does not, of itself, constitute an exercise of the trade in the United Kingdom when that department of the business from which profits or gains are directly realised is carried on in another country." These two cases were followed and applied

1. (1898) A. C. 325 2. (1908) A. C. 146.
3. (1860) 5 H. and N. 711.

The Municipal Council of Cocanada v. The "Clan Line" Steamers Ltd.

Wallis, C. J.

by the Judicial Committee in *Lowell and Christmas, Ltd.* v. *Commissioner of Taxes* [1]. In that case the question was whether any of the profits of the appellants' business, which consisted of the sale of provisions on commission in London, were "derived from New Zealand" within the meaning of the New Zealand Statute, because the appellants had agents in New Zealand who contracted with shippers there that they should consign their goods to the appellants in London for sale on commission in consideration of advances made to them against the bills of lading. The New Zealand Court held the appellants liable on the ground that these contracts from which profits resulted were made in New Zealand, but the Judicial Committee reversed the decision. Their Lordships, after referring to *Grainger and Son* v. *Gough* [2] and distinguishing *Erichsen* v. *Last* [3] and citing *Sulley* v. *Attorney General* [4] with approval, observed that the decisions did not furnish authority for going further back, for the purpose of taxation, than the business from which profits are directly derived, and the contracts which form the essence of that business. In the case before them they were of opinion that the business which yielded profit was the business of selling goods on commission in London, and that the earlier arrangements entered into in New Zealand were merely transactions the object and effect of which was to bring goods from New Zealand within the net of the business which was to yield a profit.

Looking at the facts of the present case in the light of these decisions, I think there is no ground for holding that the Clan Line exercise a trade at Cocanada. It is a shipping company which earns profits by the carriage of goods by sea, and in the course of its business trades, in Lord Herschell's language with, but not necessarily within, port towns in various parts of the world. It has not been contended before us that a ship-owner exercises his trade at all the ports at which his steamers habitually call to discharge or load cargo, which latter operation may involve entering there and then into contracts with shippers. In the absence of other arrangements the ship-owner is represented by the ship's master in all the business incidental to loading and unloading, and it is open to question whether the

1. (1908) A. C. 46.
2. (1896) 5 A. C. 325.
3. (1881) 8 Q. B D. 414.
4. (1860) 5 H. and N. 711.

The Municipal Council of Cocanada v. The "Clan Line" Steamers Ltd.

Wallis, C. J.

fact that this business is done by a resident agent himself carrying a business there, and not by the master, makes any difference. It is unnecessary to pursue this question, because it is I think clear upon the authorities, that where, as in the present case, the freight earning contracts with shippers which enable profits to be earned by sea carriage are not entered into at the port in question by the ship's master or the local agent of the ship-owner, but elsewhere, the ship-owner cannot be held to exercise his trade at the port merely because he employs a shipping agent there to attend to other matters, such as issuing shipping orders and signing bills of lading pursuant to contracts already made, and receiving payment of advance freight.

It was, however, argued that such contracts were made in Cocanada in some instances, because Messrs. Ripley & Co., delivered to shippers their letters of engagement sent by Gordon Woodroffe & Co., from Madras. I agree with Coutts Trotter, J., that this is not shown to have happened, and that even if it did happen in a few instances, what we have to see is where in substance, the business of making contracts was carried on and controlled, and that this was not at Cocanada. The appeal fails and must be dismissed with costs.

Napier, J.

Napier, J :—I entirely agree with the judgment just delivered by the learned Chief Justice but as the case is one of great importance I would like to add a few words with regard to the contentions of the appellant. We were asked to examine a certain number of old cases in which the carrying on of business has been found, to ascertain what facts were there proved and if we found some of those facts to exist in this case, to hold that carrying on business is established. I agree with the learned Chief Justice that it is not open to us to do so in a case of this class. It may be that some of the learned Judges in *Tischler* v. *Apthorpe* [1], *Pommery* v. *Apthorpe* [2], *Erichsen* v. *Last* [3], and *Werle & Co.* v. *Colquhun* [4], have used language indicating their application of tests other than applied in *Grainger and Son* v. *Gough* [5]. But the House of Lords in this last case have distinctly ignored those tests and treated those cases as decisions turning on the question where was the contract made. In two

1. (1885) 52 L. T. N. S. 814.
2. (1886) 56 L. J. Q. B. 155.
3. (1881) 8 Q. B. D. 414.
4. (1888) 20 Q. B. D. 753.
5. (1896) A. C. 325.

Pokker
v.
Chandiankandi
Kunhamad.

Ayling, J.

What was decided in these cases was this : that, where the validity of an alienation is impugned on the ground that it offends against S. 53 of the Transfer of Property Act, that alienation must be upheld until it is set aside in proceedings properly instituted for the purpose. The exact nature of the proceedings which should be instituted was not determined. In *Palaniandi Chetty* v. *Appavu Chettiar* [1], Coutts Trotter, J., expressed the opinion that a creditor suing to set aside an alienation on this ground, must do so on behalf of all creditors, unless (as in the case before us) he was a judgment creditor who had taken attachment in execution of his decree. This view was dissented from by the other learned Judge, Seshagiri Aiyar, J., and the Full Bench expressly left the point undecided. No other light is thrown on the nature of the proceedings by either judgment.

What we have therefore to consider is whether the present suit should be treated as one properly instituted for the purpose of setting aside the assignment deed, Exhibit V.

It was brought by plaintiff under O. 21, R. 63 Civil Procedure Code. 1st defendant had preferred a claim to the property attached by plaintiff, based on Exhibit V, which had been allowed under O. 21 R. 60. Plaintiff therefore brought this suit, as he was bound to do by O. 21 R. 63, to establish the right which he claimed of bringing the property to sale, as that of his judgment-debtor's.

Whether it was the judgment-debtor's property or not depends solely on whether Exhibit V be upheld or set aside. The suit directly raises, and actually turns upon, the validity of the assignment by Exhibit V : and in my opinion, it must be regarded as one properly instituted to set aside that transaction. That the plaint only asks in terms for a declaration that the property is liable to sale in execution of the decree is immaterial. The form the suit has taken is determined by the peculiar position held by plaintiff. The law declares that an attaching decree-holder against whom the claim of a third party is allowed *must* sue within a year of the date of the order to establish his right ; failing which the latter is extinguished. It puts him on a specially unfavourable position as

1. (1916) 30 M. L. J. 265.

Pokker v. Chandran-kandi Kunhamad.

Ayling, J.

regards limitation as compared with an ordinary creditor; but on the other hand in prescribing the exact nature of his remedy, it frees him from any other restrictions as to the nature of the suit to be brought which the latter may labour under. It seems to me impossible to hold that, as appellant's counsel contends, he is bound to bring two suits, one in his individual capacity under O. 21 R. 63 to save himself from limitation, and another as a representative of the whole body of creditors impugning the validity of the alienation.

Quite apart from the provisions of O. 21 R. 63, the exceptional position of a judgment-creditor is generally recognized even in English Law : *vide* 15 Halsbury 89. In *Palaniandi Chetty* v. *Appavu Chettiar* [1] Coutts Trotter, J., points out the distinction ; and although it was ignored by the learned Judges in *Hakim Lal* v. *Mooshahar Sahu*, [2] this may have been because the point was not raised and the decision of the case proceeded on altogether different grounds. Our attention has been drawn to no case in which a suit by an attaching judgment-creditor was dismissed simply because it was not brought in a representative capacity.

Whether an ordinary creditor who seeks to set aside an alienation as infringing S. 53 of the Transfer of Property Act must sue in a representative capacity we are not called upon to say. I must not be understood to hold that he is under any such obligation.

The present suit is, in my opinion, certainly not liable to dismissal on account of any defect of form ; and on the concurrent findings of fact arrived at by both the lower Courts, plaintiff is entitled to a decree. I can see no ground for questioning these findings or for holding that defendants should have been allowed further opportunity of adducing evidence.

I would therefore dismiss the Second Appeal with costs.

Krishnan, J.

Krishnan, J. :—I agree with my learned brother that this Second Appeal fails. But as the point raised by the appellant's Advocate, Mr. Shenai, as to the necessity of bringing a representative suit under S. 53 of the Transfer of Property Act is an important one and has been argued at some length before us, I shall add a few words.

1. (1916) 30 M.L.J. 565. 2 (1907) I. L. R. 34 Cal. 999.

Pokker
v.
Chandran-
kandi
Kunhamad.
——
Krishnan, J.

Both the Lower Courts found on the evidence in the case that Exhibit V, the sale-deed in favour of the appellant was intended to defeat the vendor's creditors of which plaintiff was one and that the appellant was not a transferee in good faith. The Subordinate Judge went further and found that the sale was a sham or colorable transaction which was void and did not require to be avoided. This last finding has been attacked before us and it is difficult to support it on the facts of the case. But in my view, it is an unnecessary finding and may be ignored, as the sale-deed was properly treated as unenforceable against the plaintiff on the other two findings.

It was however argued by Mr. Shenai that a creditor was not entitled to avoid a transfer under S. 53 of the Transfer of Property Act unless he had brought a representative suit on behalf of all the creditors and got a decree setting aside the deed. He contended that as this was not such a suit, we must ignore the findings as to the fraudulent character of Exhibit V and treat it as in force and dismiss the plaintiff's suit. The result of his contention if adopted will be that we should be driven to uphold a sale-deed, which has been proved to be fraudulent and voidable at plaintiff's option and enforce it against him simply because he has not brought what is called a representative suit. Such a result seems somewhat startling but Mr. Shenai contended that this proposition was supported by decided cases both in this country and in England; we must therefore examine the authorities relied on. It is conceded that there is no statutory rule on the point.

Mr. Shenai relied in the first instance on the English rule regarding cases under the statute of Elizabeth, 13 Elizabeth Chap. 5; the provisions of that statute are practically the same as that of S. 53 of the Transfer of Property Act on this point. The English rule, as stated in Halsbury's Laws of England, Vol. XV, page 89, is as follows :—"In an action to set aside an alienation under the statute a creditor should sue on behalf of himself and all other creditors of the grantor except where he has recovered judgment for his debt, in which case he can obtain an order declaring the alienation as void against him and containing consequential directions for the satisfaction of his debt alone, without mention of any other creditors or their debts."

Pokker v. Chandrankandi Kunhamad.

Krishnan, J.

As pointed out by Coutts Trotter, J., in *Palaniandi Chetty* v. *Appavu Chettiar*[1] the equity Courts used to insist that after getting a judgment in his favour, the creditor should sue out a writ of *Fi fa* or *elegit* before seeking their help to set aside a deed of transfer in equitable execution of his decree. If we adopt the rule in the restricted manner with the exception as above stated, the present suit will be a validly constituted one as it is by a judgment-creditor who has attached immoveable property, which corresponds in a general way to suing out the writ of elegit. Apart from that, it has not been shown that the rule itself was ever used for the purpose of dismissing a suit by a single creditor. No authority has been cited where such a procedure was followed in England. The cases cited in support of the rule, *viz.*, *Bott* v. *Smith* [2], *Re Mouat* [3], *Cornish* v. *Clark* [4], *Ideal Bedding Co.* v. *Holland* [5] and *Reese River Silver Mining Co.* v. *Atwell* [6] when examined, show either that the suit was brought by the plaintiff himself on behalf of all the creditors or as happened in the last case cited, the suit was allowed to be amended for the purpose in the trial Court. On the contrary in the case of *Re. Maddever* = *Three Towns Banking Co* v. *Maddever* [7] though the suit was by a single creditor, no objection was apparently taken as to its form but the decree gave as a matter of form a declaration that the conveyance in question was void against the plaintiff and all other, if any, creditors of the debtor. It seems to me therefore that even in cases of ordinary creditors, where the rule applied and not the exception, suits were not dismissed for not being brought on behalf of all the creditors, but were allowed to be amended in the trial Court or where the transfer was to be set aside, a decree was passed setting it aside on behalf of all the creditors.

As the provisions in the statute of Elizabeth and S. 53 of the Transfer of Property Act are practically the same, we may well adopt the English rule as a whole, but without giving any further scope to it either by allowing objections to the form of the suit being taken in appeal for the first time or by dismissing the suit because it is not in a representative character. As pointed out by Coutts Trotter, J., in the case in

1. (1916) 30 M. L. J. 565.
2. (1857) 52 English Reports, 957.
3. (1899) 1 Ch. 831.
4. (1872) L. R. 14 Eq. 184.
5. (1907) 2 Ch. 157.
6. (1869) L. R. 7 Eq. 347.
7. (1884) 27 Ch. D. 523.

Pokker v. Chandrankandi Kunhamad.

Krishnan, J.

Palaniandi Chetty v. *Appavu Chetty* [1] already cited, the rule has already been, to some extent, adopted in India.

There are indications in the Indian Law to show that a creditor may bring a suit under S. 53 of the Transfer of Property Act in his individual character without joining the other creditors or suing on their behalf. The wording of S. 53 itself gives the right to each individual creditor who has been defeated or delayed, a right to treat as voidable at his option, a transfer that falls within it. He has not got to exercise his option in conjunction with his co-creditors. He thus gets a cause of action for himself and there is nothing in the Code of Civil Procedure to prevent him from seeking relief by himself.

Again it would seem from the wording of the form of the decree under the Civil Procedure Code in a suit to set aside a transfer in fraud of creditors, see form No. 13, first schedule of Appendix D, a suit to which all the creditors are not parties either personally or otherwise is contemplated ; for the form of the decree in *Re Maddever's* case above cited, is adopted. The use of the words "if any" shows that all the creditors are not before the Court.

I am therefore of opinion that there is no rule either in the English or in the Indian Law, justifying the dismissal of a suit brought under S. 53, Transfer of Property Act, because it is not brought in a representative capacity. To avoid the difficulty of multiplicity of suits pointed out by Coutts Trotter, J., in *Palaniandi Chetty* v. *Appavu Chetty* [1], I think the trial Court may, of its own motion, and should if moved by the transferee defendant, direct that a suit by a single creditor under S. 53, Transfer of Property Act should be amended so as to make it a suit on behalf of all the creditors, as was directed to be done in *Ishvar Timappa* v. *Devar-Venkappa* [2]. The Court should also take care when passing a decree setting aside a transfer, even in a single creditor's suit, to adopt the form No. 13 in Appendix D above referred to. But if a suit had been proceeded with, without any objection being taken to its form on the ground of its not being on behalf of all the creditors and a decree had been passed setting aside a transfer as fraudulent,

1. (1916) 30 M. L. J. 565. 2. (1902) I. L. R. 27 B. 146.

Pokker v. Chandrankandi Kunhamad

Krishnan, J.

it seems to me that there is no justification for allowing such an objection to be raised for the first time in appeal or for ignoring the findings arrived at by the Lower Court and dismissing the suit as not being of a representative character. Such a course will make the Court really an instrument for the support of a proved fraud.

I shall now refer to the Indian cases relied on by Mr. Shenai. To start with, he relied on the Madras cases reported in *Palaniandi Chetty* v. *Appavu Chetty* [1] and in *Subramania Ayyar* v. *Muthia Chettiar* [2]. The latter case is a Full Bench decision. The point decided in both these cases was that a defendant to an action cannot plead in defence, his right to avoid a transfer under S. 53 of the Transfer of Property Act; and that if he wishes to exercise his option under that section he can do so only as a plaintiff and not as a defendant. If this question were *res-integra* I should find some difficulty in adopting this view. But it is not necessary to discuss it as the question before us now is quite different. The creditor here is not seeking to set up his right as a plea in defence but he has come to Court as a plaintiff and the question raised is whether he should do so in a representative suit only. On that question I consider that neither case is an authority. In the judgment in the Full Bench case, this question has been expressly excluded from consideration. No doubt there is an observation in it that the sale should be set aside "in proceedings properly instituted for the purpose". There is, however, no indication in the judgment what these proceedings are and as my learned brother who made the observation considers that the present suit is such a proceeding, it cannot be relied on as an authority against the respondent.

If the 30 Mad. L. J. case is examined it will be found that Seshagiri Aiyar, J., definitely ruled that no representative suit was necessary. The view of Coutts Trotter, J., on the point is not quite clear; but it seems to be that a representative suit is necessary except in the case of attaching decree-holders. The difficulty in understanding his view arises from the fact that he apparently overlooked that the case before him was that of a decree-holder who had not only attached property but had obtained an order in his favour in the claim petition. From his

1. (1916) 30 M. L. J. 565. 2. (1917) I. L. R. 41 M. 612=33 M. L. J. 705.

Pokker v. Chandrankandi Kunhamad.

Krishnan, J.

judgment it would appear that he would have supported the decree in the case if he had not treated it as one of a mere decree-holder. However that may be, if the learned Judge is to be taken as holding that a creditor's suit should be dismissed in second appeal if it is not brought in a representative capacity, with all respect, I am unable to follow him. I am inclined to agree with the view of Seshagiri Aiyar, J., on this point though I am doubtful about his view as to the applicability of S. 11, Expl. VI of the Civil Procedure Code; for in a case which ends in favour of the transferee, it may be difficult to hold that the creditors who were no parties to the suit are also barred from disputing the validity of the transfer.

The other cases relied on by Mr. Shenai are *Burjorji Dorabji Patel* v. *Dhunbai* [1], *Ishwar Timappa* v. *Devar Venkappa* [2], *Hakim Lal* v. *Mooshahar Sahu* [3], and *Chatterput Singh* v. *Maharaj Bahadur* [4]. The last one is a Privy Council ruling and the observation relied on is on page 217: "such an issue could be raised and such a decree could be made only in a suit properly constituted for that purpose and this suit was not so constituted either as to parties or otherwise." There is nothing to show that their Lordships meant by a properly constituted suit a representative suit; they do not say so. The facts of the case show that proper allegations had not been made and proper parties, *viz.*, the transferors, had not been joined to enable the Court to set aside Chutterpur's private purchase as fraudulent. The observation referred to is apparently connected with these circumstances. I am therefore not able to treat it as an authority on the point before us.

The observations in the next Calcutta case on page 1006 is no doubt in point in appellant's favour; but as the decision in the case was that the conveyance was a valid one and not liable to be set aside under S. 53 of the Transfer of Property Act they are in the nature of *obiter dicta*. It was also pointed out to us that the learned Judges had not noticed the exception recognized in the English Law to the general rule in favour of the attaching decree-holder, though the case before them was one of such a decree-holder. With every respect I

1. (1891) I. L. R. 16 Bom. 1.
2. (1902) I. L. R. 27 Bom. 146.
3. (1907) I. L. R. 34 Cal. 999.
4. (1904) I. L. R. 32 Cal. 198 (P. C.)

Pokker
v.
Chandran-
kandi
Kunhamad
——
Krishnan, J.

am unable to follow their view that a suit under S. 53 of the Transfer of Property Act is liable to be dismissed if not brought in a representative capacity. They have also not, expressed a definite opinion whether the objection should be allowed to be raised for the first time in appeal, though they were apparently inclined to hold that it should not. As I have already stated I am also of the same opinion that it should not be allowed.

I have already referred to the case in *Iswar Timappa* v. *Devar Venkappa* [1], and I am in agreement with the learned Judges there that suitable amendments may be directed by the trial Court to make a suit brought by a single creditor under S. 53 of the Transfer of Property Act, a representative suit. The actual decision in that case was that a creditor who has not obtained a decree in his favour is nevertheless entitled to sue under that section. In the case in *Burjorji Dorabji Patel* v. *Dhunbai* [2], the suit was not dismissed on the ground of its not being a representative suit, though no doubt the learned Judge was of opinion, that the suit was liable to be dismissed on that ground. This opinion however was really only an *obiter dictum*, for it was found by him that plaintiffs were claiming under the transferor himself and could not therefore impeach his transfer. It was not a case of creditors at all and was not under S. 53 of the Transfer of Property Act as the act did not then apply to Bombay. As already pointed out, the English authorities the learned Judge follows, do not show that the suit should be dismissed if not brought in a representative character. I do not therefore consider that this case which, it will be noted, is the decision of a single Judge is an authority against the view I am taking and which I should follow.

I have thus for the reasons, above stated come to the conclusion that even looking upon plaintiff as no more than an ordinary creditor of the vendor, the appellant's contention that we should now dismiss his suit should be overruled. In my view the Subordinate Judge was wrong in allowing the point to be raised for the first time in appeal.

In this case however the decree of the Lower Court can be supported on a much narrower ground as well; for the plaintiff here is not merely a creditor but an attaching decree-holder

1. (1902) I. L. R. 27 B. 146. 2. (1891) I. L. R. 16 B. 1.

Pokker
v.
Chandran-
kandi
Kunhamad.

Krishnan, J.

who was the defeated party in a claim petition filed by the transferee defendant under O. 21, R. 60, C. P. C., I have already pointed out that adopting the English rule he will have as attaching decree-holder, a personal right to sue by himself to avoid the transfer. Again as the defeated party in a claim petition, he has a statutory right of suit given to him under R. 63 and that suit must necessarily be one brought by himself alone and is not a representative suit. Under that rule he can sue to establish the right which he claims to the property in dispute and that right is that it can be attached and sold for his decree. The present suit is exactly that suit and it cannot therefore be defeated by any rule of practice which has no statutory basis. As it is necessary to find whether Exhibit V is valid against him to give him the relief claimed, the Court, I think, was bound to decide that question and he could not be referred to another suit for the purpose. In fact the suggestion of the appellant's counsel that after bringing this suit plaintiff should have at once launched another suit of a representative character to set aside Exhibit V and get a stay of this suit pending that suit if he wanted to save it from dismissal does not seem to me to be at all reasonable nor the course proposed necessary ; it is perhaps even impracticable ; I do not see why plaintiff should be driven to bring 2 suits for the same purpose. To hold that plaintiff cannot get the deed set aside except in a representative suit, will be a practical denial of his statutory right of suit ; a suit which he has to bring as pointed out by my learned brother, within one year at the risk of losing his right to attach the property if he does not do so.

The only case cited to us which was a case of an attaching decree-holder defeated in a claim petition suing, is the one in *Hakim Lal* v. *Mooshahar Sahu* [1] already referred to. But in that case the learned Judges did not consider his special and peculiar right to sue in his own name under R. 63. I have already stated that I am unable to follow their view as to the character of the suit to be brought under S 53. It is therefore no authority against the respondent.

I agree with my learned brother that the appellant's contention that the present suit should be dismissed because it was

1. (1907) I L. R 34 Cal. 999.

Pokker v. Chandran kandi Kunhamad.

Krishnan, J.

not a representative suit on behalf of all the creditors, fails, and that the Lower Courts were right on their findings in holding that Exhibit V was not valid against the plaintiff and in giving relief on that footing.

I agree the Second Appeal should be dismissed with costs.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHIM AND MR. JUSTICE OLDFIELD.

P. K. Nanjundasamy Chetty ... *Appellant* * *(14th Defendant.)*

v.

Kanagaraju *alias* Subbarayalu Chetty and another ... *Respondents (Plaintiff and Defendants Nos. 2, 3 and 5).*

Nanjundasamy Chetty v. Kanagaraju.

Hindu Law—Joint Family—Member of—Alienation for valuable consideration—What is—Gift of family property in pursuance of promise in consideration of marriage—Validity—Contract Act S. 2—"Consideration"—Meaning.

A gift made in pursuance of a promise in consideration of marriage is an alienation for valuable consideration within the rule of Hindu Law. The definition of "consideration" as given in S. 2 of the Contract Act is general and wide enough to cover such cases.

A, a member of a joint Hindu family consisting of himself and his adopted son settled a portion of the family property on the husband of his foster daughter in pursuance of a promise to that effect made just before the marriage, but after the date of the adoption; and in consideration of the marriage. On a question arising as to the validity of the settlement, *held* that it was an alienation for valuable consideration within the rule of Hindu Law and was valid to the extent of the settler's share.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Ramnad at Madura in Original Suit No. 72 of 1914 (O. S. No. 85 of 1913 on the file of the Court of the Subordinate Judge of Madura).

T. Narasimha Aiyangar for Appellant.

C. S. Venkatachari and *S. Gopala Sarma* for Respondent.

The Court delivered the following

Judgment:—The only question argued in the Appeal is as to the 3rd issue. That issue raised the question whether the alienation in favour of the 4th defendant was valid The 4th defendant is the daughter of the divided brother of the 1st defendant, now dead. The plaintiff is the adopted son of the

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* A. S. No. 424 of 1916. 3rd October 1918.

Nanjunda samy Chetty v. Kanagaraju.

1st defendant, and he sued for partition and accounts and for similar other reliefs. The 14th defendant, the appellant before us, is the husband of the 4th defendant. The fourth defendant whose heir is the 14th defendant, being her husband, died since the institution of the suit. The alienation in question was made by a document, Exhibit III, dated 19th May 1909. By it the 1st defendant purports to settle some of the property in dispute on the 4th defendant, and the validity of that settlement, according to the case of the appellant, would depend on whether it was made in consideration of the 14th defendant marrying the 4th defendant. The property would belong to the joint family, and the 1st defendant would not have been entitled to settle any property belonging to the family on the 4th defendant, if at the time the plaintiff had been adopted. The learned pleader for the appellant tried to show that the promise, according to the witnesses examined by him in connection with this question, was made before the adoption of the plaintiff by the 1st defendant. But we do not think that the evidence at all clearly makes this out. We cannot therefore uphold this contention on the part of the appellant.

But the learned pleader next argues that even if the promise to settle the property was made after the adoption of the plaintiff by the 1st defendant, since the 1st defendant upheld the deed of transfer, Exhibit III, in his written statement filed in the suit, the settlement will be effective at least to the extent of the 1st defendant's half share, in the properties. The evidence relating to the alleged promise in consideration of marriage consists mainly of the evidence of four defendant's witnesses 1 to 4 before the Commissioner. They were examined on commission at Salem, the parties being residents of Madura District. It appears that the Commissioner, Mr. Anantarama Aiyar, who, we understand, is a Vakil of the Salem Court, sent a telegram on 17th Februay 1916 to Mr. P. S Ganapathi Aiyar, a Vakil of Madura who was appearing for the plaintiff, saying that he had fixed the 19th February for the examination of these witnesses. On the 19th however nobody appeared for the plaintiff and there was no cross-examination of the witnesses. On that date however the Commissioner had received a telegram sent by Mr. Ganapathi Aiyar asking for adjournment of the examination till the 21st But he refused to adjourn the

Nanjunda-samy Chetty v. Kanagaraju.

examination as he had to return the warrant on that very day. It is quite clear on these facts that the plaintiff's pleader was not given sufficient opportunity to be present at the examination of these witnesses before Mr. Anantarama Aiyar and that the plaintiff should therefore be given proper opportunity of cross-examining the witnesses, D. Ws. 1 to 4. We must therefore ask the Subordinate Judge to send us a revised finding on the question whether there was a promise made by the 1st defendant to settle certain properties in consideration of the 4th defendant's marriage with the 14th defendant, after giving proper opportunity to the plaintiff to cross-examine the above witnesses before the Commissioner at Salem.

We allow two months for finding and 10 days for objections.

In compliance with the order the Subordinate Judge of Ramnad at Madura submitted the following finding :—

On a consideration, therefore, of all the above facts and circumstances, I am of opinion that no promise by the first defendant to settle any properties on the fourth defendant in consideration of her marriage with the fourteenth defendant has been made out by the fourteenth defendant "I find therefore against the fourteenth defendant and for the plaintiff."

The Court delivered the following

Judgment :—We think upon the evidence submitted to us that the Subordinate Judge's finding that the alleged promise by the 1st defendant to settle property worth Rs. 2,000 on the 4th defendant at the time of her marriage is not proved, is incorrect. The evidence on the point consists of certain correspondence and the deposition of certain witnesses. The 4th defendant was a daughter of a separated brother of the 1st defendant but she was brought up by him as a foster-daughter and he got her married to the 14th defendant, the appellant before us. The plaintiff who is the adopted son of the 1st defendant and is also his nephew, instituted this suit for partition. After the death of the 1st defendant during the pendency of the suit, he amended the plaint asking for recovery of properties involved in the suit. We found at the time we called for a finding from the lower Court on the point in question after giving the plaintiff an opportunity of cross-examining certain witnesses, that there was no pormise proved to settle any property on the 4th defendant before the adoption of the

plaintiff. In Exhibit III, which purports to be a deed of gift, there is allusion to such a promise, but apparently there is no other evidence which could support that statement. There is, on the other hand, evidence to the effect that at the time of the negotiation of the marriage—at what is technically called *Lagnapatrika* ceremony—the 1st defendant made a promise to give certain jewels worth Rs. 2,500 and settle property worth Rs. 2,000 on his foster-daughter, the 4th defendant. On the former occasion there was no finding on this point and we therefore wanted that the evidence should be considered from this point of view which would enable us to find whether there was such a promise and if so, whether the alleged gift in favour of the 4th defendant under Exhibit III was valid and to what extent. The marriage took place some time in 1905 within a week of the adoption of the plaintiff. The 4th defendant attained majority some time in 1908. At that time the question apparently was raised by the 14th defendant and his friends as to the 1st defendant's settling some property on the 4th defendant as promised by him. In the list Exhibit IV series, there is allusion to a promise though the date of the promise and the exact nature of it as to what is the amount of property to be settled is not mentioned. If the case of the appellant stood upon the correspondence, we should be inclined to hold that he has failed to make out his case. But we have the evidence of several witnesses examined by the defendants, especially defence witness No. 4, to make out the case of the appellant. Defence witnesses Nos. 1 to 3 say definitely that at the time of the *Lagnapatrika* ceremony they were present and that there were negotiations between the parties as to the amount of property to be settled. Then it was arranged that property worth Rs. 2,000-0-0 should be settled by the 1st defendant on the 4th defendant besides the jewels. Defendant's 4th witness is a man of considerable position in Salem. He is the Union Chairman and a member of the District and Taluk Boards in the District. He also owns considerable properties. He says that he was invited to a feast in the house of the 14th defendant in honour of the 1st defendant and his wife. That was a month or two after the marriage. On that occasion there was a talk as to what was given by way of a dowry and the 1st defendant himself said that he had agreed to give jewels worth Rs 2,500 and settle property worth

Nanjundasamy Chetty v. Kanagaraju.

Rs. 2,000 on the girl. Nothing whatever has been suggested against this witness. He is not related to either party and no sort of bias can be imputed to him. There seems to be no reason why his evidence should not be accepted; and this is also the evidence of all the other witnesses against whom nothing tangible has been alleged.

There are certain inherent probabilities of the case which also, we think, bear out the story of the appellant. The 4th defendant was not apparently a good looking girl and the 1st defendant had to go from place to place to find a proper bridegroom for her. He found one at last in Salem which is far off from the residence of the 1st and 4th defendants. The 14th defendant who belonged to a good family was in very poor circumstances and it seems to us extremely probable that there was negotiation as to the nature and amount of dowry. It also seems to be extremely likely that the 14th defendant's people insisted on some properties being settled. But no settlement was made at the time and the 1st defendant apparently put it off and the correspondence which has been filed in the case tend to suggest that at one time he said that he would make a settlement by will. However that may be, we think that a promise just before the marriage and in consideration of the marriage has been proved.

What then is the effect of Exhibit III (?). It is not contended by Mr. Narasimha Aiyangar that this transaction would affect the share of the plaintiff in the properties in dispute. What he wants us to hold is that to the extent of the 1st defendant's own share the transaction is a valid and binding one. The 1st defendant and the plaintiff were undivided co-parceners. The law is well settled that the managing member of an undivided Hindu family or any other member cannot alienate any portion of the family property except for necessity. But a co-parcener may alienate his own share either in the whole of the family property or in any particular item of it for valuable consideration. (See *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya* [1]). It is also settled law that a co-parcener cannot make a valid gift of his share. It is contended on behalf of the respondents that the transaction evidenced by Exhibit III stands on the footing of a gift. Mr. Narasimha Aiyangar contends that we must treat it as an alienation for valuable consideration just like a sale or a mortgage. There is no express authority on

1 (1902) I. L. R. 25 Mad. 690.

Nanjundasamy Chetty v. Kanagaraju.

the point and we have got to decide the question on general principles of Hindu Law as obtaining in this Presidency. In this Presidency as already stated, alienation by a Hindu co-parcener of his share for a valuable consideration is recognised, though it is not recognised in some other provinces where the Mitakshara law prevails. The question is whether a gift made in pursuance of a promise in consideration of marriage is an alienation for valuable consideration within the rule of Hindu Law. We are of opinion that it does come within the rule. According to the contract Act consideration is defined thus: 'When at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise'. If a person contracts a marriage in consideration of a promise, then it seems to us that the marriage is valuable consideration within the meaning of this definition. In this respect the law is the same in India as in England. In England, a promise made in consideration of marriage is a binding and enforceable agreement. The definition of consideration as given in S. 2 of the Contract Act seems to be general and wide enough to cover such cases.

That being so, the next step in the argument of Mr. Narasimha Aiyangar is that this agreement entered into between the 1st defendant and the 14th defendant was a valid contract which could be enforced against the 1st defendant. We do not think that this proposition can be doubted. The settlement in Exhibit III was made in pursuance of this contract. It seems to us therefore that such a settlement is an alienation for valuable consideration. It might be suggested that the Courts of this Presidency in upholding alienation for consideration by a Hindu co-parcener are making an exception to the strict notion of Hindu Law that until partition the co-parcener has no definite share in the family property. But once the validity of alienation for valuable consideration is recognised, it seems to us impossible not to include such a transaction as this within the operation of this rule. None of the cases to which we have been referred lay down that this power of a Hindu co-parcener is merely confined to sales or mortgages; but the general proposition which we deduce from the decisions

Nanjundasamy Chetty v. Kanagaraju.

in *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya* [1], *Baba* v. *Timma* [2], *Ponnusami* v. *Thatha* [3], and *Kosuri Ramaraju* v. *Ivalury Ramalingam* [4], is that an ordinary simple gift for no consideration will not, be upheld as distinguished from alienations for consideration. We therefore hold that the 14th defendant is entitled to a half share of items Nos. 3 to 8 in A schedule. As regards item No. 5, it was argued by the pleader for the respondents that as the sale to the 5th defendant of that item by the 4th defendant has been found to be not binding on the plaintiff and as the 5th defendant has not appealed specifically regarding this item, the appellant was not entitled to any share in this property. But the 5th defendant's purchase was found to be ineffective and inoperative, and the 5th defendant not having appealed, the property remains with the 4th defendant. Therefore the 14th defendant is entitled to a share in that property as well to the extent of the 1st defendant's share. The appellant and the first respondent will pay and receive proportionate costs from each other with respect to this appeal. In the Lower Court each party will bear his own costs.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SADASIVA AIYAR AND MR. JUSTICE SPENCER.

Jampana Somadu ... *Appellant.** (*1st Defendant*).

v.

Sri Raja Venkata Ramayya Appa Row Bahadur Zamindar Garu and another ... *Respondents* (*Plaintiffs*).

Jampana Somadu v. Sri Raja Venkata Ramayya.

Madras Estates Land Act (I of 1908), S 153—Proviso—Amendment Act IV of 1909, S. 8—Effect—"Old waste"—Registered lease for ten years granted before Act—Suit to eject tenant under Revenue Court—Jurisdiction—Award of mesne profits in suit—Legality, S. 153—Proviso—Effect—C. P. Code, O. 8, Rr. 3 and 5—Allegation in plaint not traversed in written statement—Effect.

In a suit brought in a Revenue Court by a landholder under the Madras Estates Land Act to evict the defendants on the expiry of the registered lease in their favour granted on 24th April 1903 for a period of ten years, *held*

(1) that the suit land having been alleged in the plaint to be "old waste" and that allegation not having been traversed in the written statement, the defendants could not, under O. 8 Rr 3 and 5, C P.C., thereafter set up the plea that the land was not "old waste;"

(2) the proviso to S. 153 of the Act applied to the case and the defendants could be ejected under the provisions of that proviso;

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* S.A No. 1569 of 1917. 31st October 1918.

1. (1902) I L R. 25 M. 690.
2. (1883) I. L R, 7 M. 357.
3. (1886) I L R. 9 M. 273.
4. (1902) I.L.R. 26 M. 74.

Jampana Somadu v. Sri Raja Venkata Ramayya.

(3) and by virtue of S. 153 read with article 19 of Part A of the Schedule to the Act, the Revenue Court had jurisdiction to try the suit; and under S. 45 of the Act, it had jurisdiction to award mesne profits.

The proviso to S. 153 of the Act was intended to add one more independent ground of ejectment.

Second appeal against the decree of the District Court of Kistna at Masulipatam in A. S. No. 134 of 1915, dated the 18th day of September 1916, preferred against the decree of the court of the Suits Deputy Collector of Kistna at Ellore in Summary Suit No. 1158 of 1914.

P. Nagabhushanam for Appellant.

T. Ramachandra Rao for Respondents.

The Court delivered the following

Spencer, J.

Judgments:—*Spencer, J*:—This suit was brought by the Court of Wards Manager of the estate of Mirzapuram on behalf of the minor zemindar, who is a landholder under the Madras Estates Land Act (Act I of 1908), to evict the defendants on the expiry of their lease in fasli 1322. In second appeal, three questions were argued: *first,* whether the land in suit is "old waste," *secondly,* whether the tenants of "old waste" can be ejected, and *thirdly* whether mesne profits can be decreed by a Revenue Court.

It was asserted in paragraph 3 of the plaint that the lands in the schedule of the plaint were "old waste", and in the written statement there is no specific denial of this fact. Therefore applying Rr. 3 and 5 of O. VIII of the Code of Civil Procedure (Act V of 1908) the defendants must be taken to have admitted the fact that the land in suit was " old waste," and it is not open to them now to set up a contention to the contrary.

The defendants held on a lease for 10 years from faslis 1313 to 1322 under a registered *muchilika,* dated 24th April 1903. S. 153, Cl. (e) of the Madras Estates Land Act provides for the ejectment by suit of a non-occupancy ryot on the ground that the term of his lease has expired in cases where he has been admitted to occupation under a registered lease for a term exceeding five years. To this section a proviso was added by S. 8 of Madras Act IV of 1909 (Madras Estates Land Act Amendment Act) which runs thus: "Nothing in this section shall affect the liability of any person who is a non-occupancy ryot according to the provisions of this Act to be ejected on the ground of expiry of the term of a lease granted before the commencement of this Act". It has been held

Jampana Somadu v. Sri Raja Venkata Ramayya

Spencer, J.

that this addition to Act I of 1908, not being worded as a proviso, furnishes an additional ground of ejectment (See the notes at page 197 of Mr. Krishnamachariar's Madras Estates Land Act). Whether this view is correct or whether the words thus added were intended merely to amplify and explain the preceding section, it is clear that the section as it now stands gives ample power to a landholder to sue in a Revenue Court to evict a non-occupancy ryot occupying land in his estate under a lease for more than five years granted before the commencement of the Act and holding over after the term has expired. Where the words of the section are so plain, it is impossible for the defendants to contend that the Act does not provide for their being ejected after the term of their lease has expired. The only authority in their favour is that in *Atchutaraju* v. *Rajah V. G. Krishnayachendralu Varu* [1], where it was held that a ryot of "old waste" could not be ejected on the ground of expiry of a term of lease contained in a contract entered into before the Act came into force. But this decision overlooked Cl. (e) of S. 153 in so far as it contained an observation in two places that S. 153 did not make the expiry of the lease a ground for ejectment. This was pointed out by me in *Ponnusami Padayachi* v. *Karuppudayan* [2], where the correctness of that decision was doubted, and *Ponnusami Padayachi* v. *Karuppudayan* [2] has since been followed by Oldfield, J., in *President District Board, Tanjore* v. *Kunnusami Thondaman.* [3]

It is suggested that the defendants who are ryots of "old waste" are not necessarily non-occupancy ryots within the meaning of the proviso to S. 153. But this contention is inconsistent with S. 6, Cl. (3) of the Act, and in Mr. Ramadoss' Commentary on the 'Estates Land Act' at page 256 and in Mr. Krishnamachariar's book at page 195 a category of non-occupancy ryots is given which includes ryots of "old waste". From the definition in S. 3, Cls. (7) and (12), it is clear that a "ryot" is the term used in the Act for a tenant of "ryoti" land and that land may be "old waste" and yet be "ryoti land", the term "old waste" merely denoting that it has not been occupied for 10 years by any one with a right of occupancy.

1. (1913) I. L.R. 38 M. 163.
2. (1914) I. L. R. 38 M. 843=26 M. L. J. 9285.
3. (1916) 35 I. C. 121.

Jampana Somadu v. Sri Raja Venkata Ramayya

Spencer, J

The last question is whether mesne profits can be decreed by a Revenue Court. On this point, I think that S. 45 authorises a Revenue Court to award this form of Rent. In *Kamaluammal* v. *Athikari Sangali Subba Pillai* [1], it was held that a Revenue Court has this power against any persons, even trespassers, in unlawful possession of ryoti land.

Another question that was referred to in the District Court but not taken in second appeal, is that of the jurisdiction of the Revenue Courts to try a suit of this nature. Such a contention could not be raised with any chance of success, in view of S. 153, read with Article 19 of Part A of the Schedule to the Act, and in view of the recent decision in *Yelikapalli Venkaya* v. *Venkataramayya Appa Row.* [2] It is not necessary to do more than to point out for the District Judge's information that he was mistaken in supposing that the case in *Ponnusami Padayachi* v. *Karuppudayan* [3] would support an objection on the score of jurisdiction of the Revenue Court in this case, seeing that the lease on which the defendants occupied the plaint land and held over on its expiry was one for a term exceeding five years, for which cl. (e) of S. 153 expressly provides, and that *Ponnusami Padayachi* v. *Karuppudayan* dealt only with leases for a period of less than five years which terminated before the Act came into force, for which there is no express provision in S. 153, and thus no jurisdiction conferred upon the Collector by Article 19 of Part A to the schedule which applies to suits for eviction under this section only (see column 2) and the words "before the Collector" in S. 153.

As the contentions raised by the appellants' vakil have failed, the second appeal must be dismissed with costs.

Sadasiva Aiyar, J.

Sadasiva Aiyar, J:—I wish to add only a few words on the additional provision enacted in 1909 and added to S. 153 of the Estates Land Act. The body of the section enacts that a non-occupancy ryot (including a non-occupancy ryot in possession of old waste) shall be liable to ejectment on one or more of the grounds (*a*) to (*e*) mentioned therein "*and not otherwise.*" Then this addition of 1909 by the Legislature enacted that "nothing in this section shall affect the liability of any person who is a non-occupancy ryot according to the

1. (1917) 35 M. L. J. 11. 2. (1917) 33 M. L. J. 757.
3. (1914) I. L. R. 38 M. 843.

Jampana Somadu v. Sri Raja Venkata Ramayya

Sadasiva Aiyar. J.

provisions of this Act to be ejected on the ground of expiry of the term of a lease granted before the commencement of this Act." I find it impossible to hold that this addition was not intended to add one more *independent* ground to the grounds (a) to (e) on which the tenant was liable under the unamended section to be ejected at the suit of the landlord. The ingenious argument of Mr. Nagabushanam that this addition cut down the meaning of the plain language of cl. (*e*) so as to confine the expression "a registered lease" found in that clause to a lease executed after the Act came into force and so as to exclude a registered lease-deed executed before the Act came into force did not impress me at all as valid. It is difficult to believe that the Legislature while granting the right to the landlord to eject on the expiry of the lease term, a tenant of old waste to whom a registered lease-deed for a term exceeding five years was granted after the Act came into force, intended to refuse the same right to eject, to the landlord if the lease-deed whose term has expired had been granted before the Act.

As regards the other points dealt with in the judgment of my learned Brother, I express my concurrence and have nothing to add.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SESHAGIRI AIYAR AND MR. JUSTICE PHILLIPS

Asan Alliar Maraikayar and another ... *Appellants* * (*Paintiffs*).

v.

T. B. Masilamani Nadar and another ... *Respondents* (*Defendants*).

Asan Alliar Maraikayar v. Masilamani Nadar.

Illegal search—Action for—Criminal Procedure Code, Act V of 1898, S. 4 (p) "Officer in charge of a police station," meaning of—A person assisting an officer in a search, whether liable for illegal search.

If a person is deputed to be in charge of a police station in the absence of the permanent incumbent, the fact that he was doing duty within the limits of the jurisdiction of the police station but outside the station house, does not deprive him of his capacity of station-house officer.

The aim of S. 4 (p) of the Criminal Procedure Code, is to bring in more men, so that the duties of the officer may be performed without delay and not to exclude persons who are either permanent incumbents or who have been appointed to act for the permanent incumbents.

* S. A. No. 2158 of 1917. 18th November, 1918.

Asan Alliar Maraikayar v. Masilamani Nadar.

A person who assists in the conduct of a search by a police officer entitled to make a search under the Criminal Procedure Code is not liable in damages for an illegal search.

Second appeal against the decree of the District Court of Tinnevelly in A. S. No. 500 of 1916, preferred against the decree of the court of the Additional District Munsif of Tinnevelly in O. S. No. 211 of 1915.

K. R. Gurusami Aiyar and A. Subbarama Aiyar for Appellants.

C. Narasimhachariar and S. Anantharama Aiyar, for Respondents.

The Court delivered the following

Seshagiri Aiyar, J.

Judgments :—*Seshagiri Aiyar, J* :—This is a suit against two policemen for damages for illegal search of the plaintiff's house. On the 29th January 1915, the two defendants undoubtedly conducted the search. The District Munsif held that the search was illegal and awarded Rs. 100 as damages against each of the defendants. In appeal the District Judge exonerated the 2nd defendant altogether and gave a rupee damage against the 1st defendant. The plaintiffs have preferred this second appeal and the 1st defendant has filed a memorandum of objections.

On the question whether the 2nd defendant should be held liable I have come to the conclusion that the District Judge is right. The main argument addressed to us by the learned vakil for the appellant was that the 2nd defendant was not an officer in charge of a police station and that consequently he had no power to make the search. Under S. 4, Cl. (p) of the Code of Criminal Procedure an officer in charge of a police station includes, when a permanent incumbent is absent or unable to perform his duties, "the police officer present at the station-house who is next in rank to such officer and is above the rank of a constable." In the present case, the Sub-Inspector as he is called, who is the officer in charge of the police station of Valliyoor left his jurisdiction for the purpose of pursuing a gang of thieves. This was on the 26th January 1915. The only evidence we have in the case as to what happened when he left the station is the deposition of the 2nd defendant in which he says: "I am the general charge officer and I look after the station work during the Sub-Inspector's absence as senior

Asan Alliar Maraikayar v. Masilamani Nadar.

Seshagiri Aiyar, J.

officer of the station." Relying upon this evidence the District Judge has come to the conclusion that the 2nd defendant was put in charge of the station when the permanent incumbent went out of the jurisdiction. I see no reason to differ from this finding of fact.

It is in evidence, however, that the 2nd defendant left the headquarters of the station on the 26th to inspect some of the outlying villages within his jurisdiction. There is some doubt whether he returned back on the 29th or not. I am of opinion having regard to what he states in the earlier portion of his deposition, that he was not in the station house on the 29th. But that does not matter. If he was deputed to be in charge of the station, the fact that he was doing duty elsewhere does not deprive him of his capacity of station house officer. If Mr. Gurusami Aiyar's contention were upheld, every moment that the officer in charge of a police station leaves the station house a new station house officer must be installed there. Take for example a case in which the permanent incumbent who left the jurisdiction returns to the jurisdiction under his charge but not to the station house; if the contention for the appellants were upheld, until he takes charge of the station house, he cannot exercise the functions of an officer in charge of the police station. I am unable to agree with this contention. The object of the definition is to permit of the discharge of duties which can only be done by an officer in charge of a police station by some person who is deputed to look after that work. The aim is to bring in more men so that the duties of the office may be performed without delay, and not to exclude persons who were either permanent incumbents or who have been appointed to act for the permanent incumbent. My opinion, therefore, is that as the 2nd defendant was within the jurisdiction of the police station and as he was appointed to act for his superior when the latter went outside the jurisdition, he was an officer in charge of a police station. It may be that Arunachallam Pillai, the station writer as he is called was also an officer in charge of a police station, but it is not necessary to consider that matter. I am clear that the 2nd defendant was an officer in charge of the police station of Valliyoor. I do not think that the words 'present at the station house' would necessarily have the effect of depriving an officer of his functions

Asan Alliar Maraikayar v. Masilamani Nadar

Seshagiri Aiyar, J.

if he happens to go out of the station house. That clause, as I said before, is intended to empower more men to discharge these duties and not to deprive others of their functions. In this view, I am of opinion that the 2nd defendant in conducting the search, acted within his powers. There is the finding by the District Judge that in exercising those powers he did not act harshly or oppressively. I am of opinion that the exoneration of the 2nd defendant was right. Therefore the appeal so far as he is concerned must be dismissed with costs.

The question of the liability of the 1st defendant is somewhat different. He is not attached to the Valliyoor station. He is the head of another station. Therefore, *prima facie* he acted without jurisdiction in making the search. Under S. 166 of the Code of Criminal Procedure if a theft is committed within the limits of a police station, and if the property is concealed within the limits of another station, the officer in charge of the station where the theft was committed can requisition the aid of the officer in charge of the station where the thief has secreted the property to cause a search to be made. That is not this case. The plaintiffs against whom the suspicion of having received stolen property was entertained had their house within the limits of Valliyoor station. Therefore the 1st defendant had absolutely no right to make any search. I find no provision of law which would enable a police officer who did not belong to the constabulary of a particular police station to come within its limits and to help in the search of property. I must therefore hold that the 1st defendant acted without jurisdiction.

It was suggested in the course of the hearing that as the 2nd defendant was acting within his powers in making the search, the association of the 1st defendant did not matter. In *Morris* v. *Wise* [1], it was held that a person assisting a constable or other officer engaged in carrying out a lawful process of law would be justified as it would not be unlawful to take part in a lawful act. Having regard to the rank of the 1st defendant, it is doubtful whether he can be said to have simply assisted the 2nd defendant. But the 2nd defendant had jurisdiction to conduct the search and was doing a lawful act. Consequently, if the entry into the plaintiff's house for the purpose of a search was lawful, can it be said that the association of

1. (1860) 2 F. and F. 51.

Asan Alliar Maraikayar v. Masilamani Nadar.

another in this act was an actionable wrong? After consideration I am inclined to agree with my learned brother, that he too was not liable. It is unnecessary to consider the other questions argued before us. I agree therefore that the memorandum of objections should be allowed with costs.

Phillips, J.

Phillips, J :— Plaintiff's suit is for damages for wrongful trespass committed by defendants in searchin gtheir house. The District Judge has found that 2nd défendant was the officer in charge of the Valliyoor Police Station within the limits of which the search was conducted. The evidence of defendants 1 and 2 supports this finding and I think it may be accepted. The contention put forward by Mr. Gurusami Aiyar that the Sub-Inspector, who had been put in charge of the station, could be the only officer in charge of the station, subject to the proviso in S. 4. (p) of the Criminal Procedure Code does not appear to be correct. The Sub-Inspector was absent from the station on special duty and during his absence it would be necessary to have some other officer in charge and the evidence is that 2nd defendant was that other officer. S. 4 (p) of the Criminal Procedure Code only provides that in the temporary absence of the officer in charge the next senior officer above the rank of constable shall also be deemed to be officer in charge of the station. This does not take away the power of acting as such from the officer who is really in charge of the station, for it is only necessary to state the proposition to see its absurdity. It would mean that as soon as such officer left the station house, the next senior officer would be the only officer in charge and no search outside the station house could be conducted by the officer in charge. Accepting this finding the suit was rightly dismissed as against 2nd defendant.

The District Judge has, however, found that 1st defendant acted without jurisdiction in that he took part in a search which he had no jurisdiction to make. The search being conducted by 2nd defendant was made with jurisdiction and the fact that a person not authorised by the Code to conduct the search took part in it, does not invalidate the search. It is not necessary that a person who conducts a search should do all the acts connected with the search with his own hand, but it is sufficient if he is present and personally supervises the proceedings. *Vide Sadagopa*

Asan Alliar Maraikayar v. Masilamani Nadar.

Phillips, J.

Charlu v. *Satrughna Behara*. [1] In most searches one or more constables assist the officer conducting the search, and sometimes a cooly is employed to do manual labour, such as digging up the floor, etc., to facilitate the search. I do not for a moment think that such assistants could be held to be liable in damages for rendering such assistance. In the present case the 1st defendant being 2nd defendant's superior officer, no doubt took a considerable part in effecting the search, but that is no reason for saying that he conducted the search, for he had been careful enough to send for 2nd defendant to conduct the search, knowing that he had no jurisdiction to conduct it himself. In doing what he did he cannot be said to have exceeded his jurisdiction, and he is not liable in damages to plaintiffs. In this view the second appeal must be dismissed with costs, and in allowance of the memorandum of objections plaintiff's suit must be dismissed with costs throughout.

C. A. S.

PRIVY COUNCIL.

PRESENT:—LORD BUCKMASTER, LORD DUNEDIN, SIR JOHN EDGE AND SIR LAWRENCE JENKINS.

[On appeal from the High Court of Judicature at Madras.]

Sreemanthu Raja Yerlagadda Mallikharjuna Prasad ... *Appellant.**

v.

Rajulapati Somayya and others. ... *Respondents.*

P. C.

Raja Yerlagadda Mallikharjuna Prasad v. Rajulapati Somayya.

Land-law of Madras—Occupancy rights of tenants—Private and ryoti lands—Acquisition of occupancy rights under Madras Act I of 1908—Actual possession at the commencement of that Act the test—Madras Estates Land Act, 1908 (Madras Act I of 1908) Ss. 6, 185—Madras Act IV of 1909, S. 3.

Under S. 6 of the Madras Estates Land Act, 1908 (Madras Act I. of 1908) as explained by S. 3 of Madras Act IV of 1909 every person who having held land as a ryot continues in possession of such land at the commencement of Act I of 1908 obtains a permanent right of occupancy in such holding, even though his possession at the commencement of the act was without the consent or against the wishes of the landholder.

Semble, that such right is acquired by the tenant in possession even though a decree for possession has been passed against him.

Govinda Parama Guruvu v. *Bothasi Dandasi Pradhanu*, [2] ref.

Appeal from a decree of the Madras High Court (Wallis, C. J. and Seshagiri Aiyar, J.) affirming a decree of the Subordinate Judge of Masulipatam. See 27 M. L. J. 718 for Judgment of the High Court.

P. C. Appeal 104 of 1916. * October 29, 1918.

1. (1912) 23 M. L. J. 445.
2. (1910) 20 Mad. L. J. 568.

P. C.

Raja Yerlagadda Mallikharjuna Prasad v. Rajulapati Somayya.

The facts of the case are sufficiently stated in their Lordships judgment. Both the Lower Courts dismissed the appellant's suit.

De Gruyther, K. C. (*Kenworthy Brown with him*) for appellant. The question is whether a person who insists upon holding over after his tenancy is determined is within the purview of S. 6 of Madras Act I of 1908. We submit not. The Act commenced in July 1, 1908. On that date the defendants' occupation was not permissive under S. 6: they were not ryots in possession. They were holding over without the landlord's consent. This point was not pressed in the High Court because that Court held that even a trespasser came within S 6: In this they were wrong: the intention of the Act of 1908 was to relieve the ryot of the necessity of proving occupancy right, not to deprive the zemindar of rights when there was no ryot. If the Act had not been passed there is no question the zemindar could have ejected these defendants.

Where the Statute deals with lawful possession, the word used is possession: when less than lawful possession is referred to, the term is "occupation." S. 45 provides for payment for such use and occupation: S. 163 provides that such an occupant can be ejected. The point we raise was not argued or decided in *Govinda Parama Guruvu* v. *Bothasi Dandasi Pradhanu* [1] or in the Full Bench case of *Kanakkaya* v. *Janardhanapadhi*. [2] All that was laid down in those cases was that if the ryot were in possession, a decree did not terminate that possession: that he was in possession was assumed, as will appear from the order of reference in the last case: but this is the very point we dispute.

Our second point is that these lands were private lands, not ryoti. It is not essential that the landlord should always cultivate the whole of the kamatam lands. No doubt S 185 raises a presumption against the land being private, but the mere fact that the Zemindar cannot show that he has evercultivated himself is not conclusive, and does not prevent him from displacing the presumption by other evidence. The proviso to S. 185 is not exhaustive.

Kenworthy Brown followed, and referred to *Sivapada Mudali* v. *Thayagaraja Chettiar* [3].

Respondents did not appear.

Their Lordships' judgment was delivered (December, 3 1918,) by.

Sir John Edge.

Sir John Edge:—This is an appeal from a decree, dated the 26th November, 1914, of the High Court at Madras, which

1 (1910) 20 Mad. L. J. 529.

2. (1910) I. L. R. 36 Mad. 439=21 M. L J. 31. (F. B.)

3- (1914) 27 M. L J. 665.

P. C.

Raja Yerlagadda Mallikh arjuna Prasad v Rajulapati Somayya.

Sir John Edge.

affirmed a decree, dated the 22nd November, 1912, of the Subordinate Judge of Masulipatam, by which the suit had been dismissed.

The plaintiff is a zamindar, and he brought his suit on the 3rd of April, 1910, for a declaration that certain lands within his zamindari in the village of Ayyanki, in the Kistna District, of which the defendants were in possession, were his private lands within the meaning of the Madras Estates Land Act 1908 (Madras Act I of 1908), in which the defendants had no right of occupancy; for the ejectment of the defendants from those lands, and for mesne profits. The defendants resisted the suit on the ground that the lands in question were ryoti lands within the meaning of the Act, and that they had in them rights of occupancy and were not liable to be ejected by the Civil Court.

As defined by Madras Act I of 1908, private lands means :—

"The domain or home farm land of a landholder by whatever designation known such as *kambattam*, *khas*, *sir* or *pannai*."

Ryot as defined by that Act means :—

"A person who holds for the purpose of agriculture ryoti land in an estate on condition of paying the landholder the rent which is legally due upon it."

Ryoti land as defined by that Act means :—

"Cultivable land in an estate other than private land, but does not include (*a*) tank-beds, (*b*) threshing floors, cattle stands, village sites, and other lands situated in any village which are set apart for the common use of the villagers, (*c*) lands granted on service tenure either free of rent or on favourable rates of rent if granted before the passing of this Act or free of rent if granted after that date, so long as the service tenure subsists."

The lands in question do not satisfy the conditions mentioned in (*a*), (*b*) or (*c*), and are therefore not excluded from the statutory definition of *ryoti* land. They were cultivable lands in the estate of the plaintiff, and had been held by the defendants for the purpose of agriculture under a *muchilika*, which will be presently referred to, and were not old waste lands.

It was enacted by Madras Act I of 1908 as follows :—

"6. (1) Subject to the provisions of this Act, every ryot now in possession or who shall hereafter be admitted by a landholder to possession of ryoti land not being old waste situated in the estate of such landholder shall have a permanent right of occupancy in his holding; but nothing contained in this sub-section shall affect any permanent right of occupancy that may have been acquired in land which was old waste before the commencement of this Act. . . ."

P. C.

Raja Yerlagadda Mallikharjuna Prasad v. Rajulapati Somayya.

Sir John Edge.

To sub-section (i) of S. 6 was added by Madras Act IV of 1909 the following explanation :—

" *Explanation.*—For the purpose of this sub-section, the expression 'every ryot now in possession' shall include every person who, having held land as a ryot, continues in possession of such land at the commencement of this Act."

S. 185 of Madras Act I of 1908 is as follows :—

"185. When in any suit or proceeding it becomes necessary to determine whether any land is the landholder's private land regard shall be had to local custom and to the question whether the land was before the first day of July, 1898 specifically let as private land and to any other evidence that may be produced, but the land shall be presumed not to be private land until the contrary is shown Provided that all land which is proved to have been cultivated as private land by the landholder himself by his own servants or by hired labour with his own or hired stock for twelve years immediately before the commencement of this Act shall be deemed to be the landholder's private land."

Madras Act I of 1908 received the assent of the Governor of Madras on the 25th March, 1908, and the assent of the Governor-General on the 28th June 1908.

The plaintiff endeavoured to prove that by custom the lands in question were his private lands. He failed to prove any such custom. In a *muchilika* of the 28th July 1907, which the defendants or some of them gave to the plaintiff, and under which they agreed to hold the lands as his tenants until the 30th April, 1908, the lands were described as "*Diwanam Kamatam* (Private) lands." Clause 8 of that *muchilika* is as follows :—

"8 As we have no manner of right and title to the said lands, neither we nor our heirs shall raise any objection to your leasing out the lands according to your pleasure at the expiration of the term, that is, after 30th April, 1908, without the need for a fresh relinquishment from us or any notice from your sircar at the close of the period of this *khat* (*muchilika*), considering this itself as a relinquishment and as a notice."

At the trial of the suit there was a conflict of evidence as to whether the lands were the private lands of the plaintiff or were ryoti lands, and the evidence which was produced was fully and carefully considered by the trial Judge, who found that the plaintiff had failed to prove that the lands had been cultivated and dealt with as private lands by the plaintiff and his predecessors in-title. The trial Judge found that the lands were ryoti lands, and by his decree dismissed the suit.

From that decree dismissing the suit the plaintiff appealed to the High Court at Madras. The appeal was heard by the Chief Justice and Mr. Justice Seshagiri Aiyar, who agreed with the finding on the evidence of the trial Judge. The learned Chief Justice in his judgment said :—

P. C.

Rajah Yerlagadda Mallikh-arjuna Prasad *v.* Rajulapati Somayya

Sir John Edge.

"The Subordinate Judge has found and I agree with him that the suit lands were never cultivated by the Zemindar as part of his home-farm lands, and it seems to me that his treatment of them as kambattam was merely colourable for the purpose of defeating the occupancy rights of the tenants. In some parts of India lands of this kind are known as *sir* lands, and this is one of the terms mentioned in the definition. In *Budley* v *Bukhtoo* [1]. It was held that *sir* land is land which a Zemindar has cultivated himself and intends to retain as resumable for cultivation by himself even when from time to time he demises it for a season. I think that this test may well be applied here, and that, as the plaintiff has failed to satisfy it, the appeal fails and must be dismissed with costs."

That test is obviously suggested by S. 185 of the Act, and was rightly applied by the Chief Justice. Mr. Justice Seshagiri Aiyar in his judgment stated that "I see no reason to differ from the conclusion at which the Lower Court has arrived." The High Court by its decree affirmed the decree of the Subordinate Judge and dismissed the appeal. From that decree of the High Court the plaintiff has brought this appeal.

The concurrent findings of fact as to the lands being ryoti lands must be accepted as binding on the appellant. But it is contended that after the 30th April, 1908, when their term expired, the defendants were trespassers on the lands, and continued to be and were trespassers when Madras Act I of 1908 was passed and came into force, and that the explanation to sub-section (i) of S. 6 of Madras Act I of 1908, which was added by Madras Act IV of 1909, does not apply to a person whose continued possession of ryoti land is that of a trespasser, and applies only when the person continuing in possession does so with the consent of the landholder, which as a fact was not the case here. As a fact, the defendants continued in possession of the ryoti lands in suit after the 30th April, 1908, not only without the consent of the plaintiff, but contrary to his wishes and expressed intentions, and contrary to the terms of clause 8 of the *muchilika* of the 28th July, 1907. The Appellant's contention as to the effect of the explanation to sub-section (i) of S. 6 is, in the opinion of their Lordships, unsound and untenable. The defendants had held the lands from the 28th July, 1907, until the 30th April, 1908, for the purpose of agriculture on condition of paying to the plaintiff, the landholder, the rent legally due upon the lands. The lands were ryoti lands, as has been found by each Court below, and the defendants were, in fact, continuing in possession of the

1. (1871) 3 N. W. P. 203.

P. C.

Raja Yerlagadda Mallikharjuna Prasad v. Rajulapati Somayya.

Sir John Edge.

land at the commencement of Madras Act I of 1908, although such continuing in possession was without the consent and was contrary to the wishes of the plaintiff The construction of sub-section (i) of section 6 of Madras Act I of 1908 as amended by S. 3 of Madras Act IV of 1909 is too plain for argument. Assuming that the defendants had not any permanent right of occupancy in the lands in question before the commencement of Madras Act I of 1908, they obtained a permanent right of occupancy in the holding by the operation of S. 6 sub-section (i) as amended by S. 3 of Madras Act IV of 1909, and the suit was rightly dismissed by the Civil Court.

The effect of S. 6 sub-section (i) of Madras Act I of 1908, as amended by S. 3 of Madras Act IV of 1909, came before the High Court of Madras in *Govinda Parama Guruvu* v. *Bothasi Dandasi Pradhanu and others* [1], in 1910. In that case the landlord had before the 1st July, 1908, obtained a decree for possession of ryoti land against the occupiers who were in possession on the 1st July, 1908, and Benson and Sankaran Nair, JJ., rightly held that :—

"It is immaterial that a decree for possession had been already passed. We must, therefore, hold that the defendants are ryots with a permanent right of occupancy."

See also G. *Kanakayya* v. *Janardhana Padhi and others* [2].

This appeal fails. Their Lordships will humbly advise His Majesty that this appeal should be dismissed. As the respondents have not appeared there will be no order as to the costs of this appeal.

Solicitor for appellant .—*Douglas Grant.*

A. P. P.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE AYLING, MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE KRISHNAN.

Muhammad Esuf Sahib v. Moulvi Abdul Sathar Sahib.

Muhammad Esuf Sahib and another ... *Appellants* Appellants (Defendants),*

v.

Moulvi Abdul Sathar Sahib and another *Respondents (Respondents—Plaintiffs).*

Civil Procedure Code S. 92—Mosque—Public trust—Evidence of user—Entries in Inam register—Value of—Mutawalli—Breach of trust and neglect of

* L. P. A. No. 32 of 1918. 8th October, 1918.

1 (1910) 20 Mad. L. J. R. 528. 2. (1912) I. L. R. 36 Mad 439.

Muhammad Esuf Sahib v. Moulvi Abdul Sathar Sahib.

duty—Resumption of inam—Imposition of full assessment—Grant of ryotwari puttah to defaulting mutawalli—Effect of—Trusts Act, S. 88, principle of applicable to public trusts—Hereditary trustee—Breach of trust—Removal of descendants of trustee, if proper.

The question whether an institution is a public mosque coming within S. 92 of the Civil Procedure Code must, in the absence of express evidence of the terms of the original foundation, be determined by user. The entries in the Inam Register as to the nature of the endowment are good evidence of its public or private character. *Held,* (*Spencer J. dissentiente*) on the evidence in the case, that the suit mosque was a public trust within the meaning of S. 92 of the Civil Procedure Code.

In the year 1798 certain lands were granted in Inam by the Nabob of the Carnatic for the building of a mosque and the performance of certain services and charities in connection therewith There was nothing to show that the intention of the grantor was to confer any personal benefit on the trustee or manager of the institution. In 1861 the Inam Commissioner during his enquiries found that the conditions of the endowment were all regularly fulfilled and confirmed the original grant, classing the lands as a religious endowment and describing the ancestors of the defendants as managers thereof. In 1898 the Inam was resumed and the lands were fully assessed to revenue by the Government on account of the failure of the defendants who were then the trustees, to perform the religious services for which they had been granted. Ryotwari pattas for the lands were issued in favour of the defendants who continued in possession of the same In 1915 a suit under S. 92 of the Civil Procedure Code was instituted for removing the defendants from the trusteeship of the mosque and for an account of the income of its endowments. The defendants contended that the effect of the resumption coupled with the issue of ryotwari pattas in their favour, was to put an end to the trust and to vest the lands in them as their absolute property and that the suit was not maintainable.

Held, overruling the plea of the defendants, that the resumption by the Government was of the land revenue alone and that the lands continued to be trust property, subject, however, to the liability to pay the assessment. Assuming that the Government resumed the lands and not merely the assessment and regranted the lands in favour of the defendants, the latter could only hold the property so acquired subject to the trust, since it was their own breach of trust that led to the resumption and the regrant. The principle underlying S. 88 of the Trusts Act is a general one and applies to public trusts.

Sikkander Rowther v. *The Secretary of State for India* 1 approved. *Punniah* v. *Kottama* 2, distinguished.

Where in a suit under S. 92 of the Civil Procedure Code the Court removes a hereditary trustee on the ground of misconduct and appoints fresh trustees, it is not proper to make a provision in the decree debarring the hereditary trustee's descendants for ever from holding the trusteeship.

Per Spencer, J.—(dissenting).

Whether the original grant by the Government was of the land or of the revenue alone, resumption implied a taking back of whatever was granted, leaving nothing for the trust. The resumption by the Government and the subsequent issue of ryotwari pattas in favour of the defendants had the effect of putting an end to the trust and vesting the property absolutely in them. Consequently the defendants were not liable to account for the income of the lands in a suit under S. 92 of the Civil Procedure Code.

1. (1916) 5 L. W. 402. 2. (1916) I. L. R. 40 Mad. 989.

Muhammad Esuf Sahib v. Moulvi Abdul Sathar Sahib.

Held, further, that having regard to the circumstances connected with the grant and the resumption of the inam, its registration in the name of an individual grantee and not in the name of any institution, and the other evidence in the case, that the suit mosque was not a public trust within the meaning of S. 92 of the Civil Procedure Code.

Appeal under Cl. 15 of the Letters Patent against the Judgment of the Hon. The Chief Justice in A. S. No. 221 of 1917 preferred to the High Court against the decree of the District Court of South Arcot in O. S. No. 3 of 1915.

The case came on for hearing before their Lordships. The Chief Justice and Spencer, J., who delivered the following

Wallis, C. J.

Judgments :—*The Chief Justice* :—The District Judge has found that the mosque in question is a public mosque and I see no reason to differ from his conclusion The 1st defendant who should be in possession of the original purvanah or grant by the last ruling Nawab of the Carnatic has not produced it, though it was produced by his predecessors before the Inam Commissioner in 1861. The Inam Register mentions the objects with which the lands were granted *viz.*, the building of a mosque and the performance of certain ceremonies in commemoration of the Nawab Wallajah whose body rested on the site of the mosque on the way from Madras to Trichinopoly. In the absence of express evidence as to whether the mosque was dedicated for public worship, the point must be determined by user, and it is clear from the evidence that the mosque has always been open to the public for worship. The 1st defendant was fined on one occasion for interfering with the public worship there, and in his cross-examination he had to admit that the public had a right to worship there. In these circumstances it is immaterial whether it is called a Jumma Musjid or not; but the fact that the worshippers were styled Jamayatkars, as spoken to by him, goes to show that it was a Jumma Musjid. It must, I think, go to show that the grant was to the original grantee in the deed which has not been produced, as Muttawalli, and this is confirmed by the fact that in the Inam Register, *under the column headed* "particulars regarding present owner," three persons, are entered as "enjoying together as managers of the musjid". It was, I think, clearly a grant on trust, as held in a very similar case in *Sikkandar Rowthan* v. *The Secretary of State for India* [1].

It must, I think, be taken that the mosque was founded, dedicated and endowed for public worship. The inam granted for these purposes was confirmed by the Inam Commissioner subject to the due performance of services but was resumed in 1893 for failure duly to perform them. With regard to the suggestion that the original grant was only of the assessment and not of the lands, I think it is clear that the

1. (1916) 5 L. W. 402.

Muhammad Esuf Sahib v. Moulvi Abdul Sathar Sahib.

Wallis, C. J.

site of the mosque was granted, and I think the presumption is that there was a grant of the other lands as well. The purvana has not been produced by the defendants, and I think it is not likely that the 1st muttawalli a grantee of the mosque was the owner of the lands prior to the grant. Now it is quite clear that Government might have resumed both the lands and the assessment, and regranted the lands to any one they chose at the full assessment. What it did was to require payment of the full assessment from the descendant of the person in whose name the inam had been confirmed, and the main question argued was, whether they must be taken to have resumed both the lands and the assessment and regranted the lands as private property to the 1st defendant, or whether they merely resumed the assessment and did not interfere with the ownership of the lands. They were clearly in my opinion lands dedicated to charity though liable to be resumed, and the 1st defendant and his predecessors were merely in the position of muttawallis or trustees. In these circumstances I can find no reason for presuming that the Government intended to resume the lands as well as the assessment and to regrant the lands to the muttawalli as his private property. As the resumption of the assessment was occasioned by the failure of the muttawalli to perform his duties, it seems unlikely that the Government intended to make a fresh grant of the lands in his favour freed and discharged from the charitable trusts to which they had till then been subject. That would in effect be rewarding the defaulting muttawalli for his breach of duty. I see no sufficient reason for imputing this intention to Government, and consider that the lands still remained subject to the charitable trust even after the assessment had been resumed. In *Punniah* v. *Kottamma* [1] it appears to have been assumed that the land itself was resumed and granted as private property freed from all charitable trusts to the 1st defendant. The point that the land itself was not resumed but continued subject to the charitable trust was not raised before the court or adjudicated on. What the plaintiff wanted was a half share in the land for which a patta had been issued in the name of the defendant, his co-trustee, and the interests of the charity were not represented at all. On the other hand in *Sikkandar Rowthan* v. *The Secretary of State for India* [2] which was also the case of mosque, it was held that the lands had been dedicated for the support of a public mosque and that the so-called resumption of the inam for failure of the trustees to perform their duties had not the effect of making the lands cease to be trust properties. The contest in that case was whether the lands had been dedicated for a public charitable purpose. If so, it does not appear to have been seriously questioned that a mere

1. (1916) I. L. R. 40 M 939. 2. (1916) 5 L. W. 402.

Muhammad Esuf Sahib v. Moulvi Abdul Sathar Sahib.

Wallis, C. J.

resumption of the assessment could be taken as indicating that Government had exercised its right of resuming the lands themselves and granting them to the defaulting trustees as their private property I think this decision is in accordance with the principle which to some extent underlies the decision in *Gunnaiyan* v. *Kamakshi Ayyar* 1, and *Pingala Lakshmipathi* v. *Bommareddipalli Chalamayya*. 2, that when Government resumes an inam by imposing the full assessment and does nothing more, and does not expressly resume the lands as well, the ownership of the land is unaffected and if it was subject to any charitable trust it still continues subject to it. In these circumstances I think the decree of the District Judge should be confirmed except as to one point. The words in the decree after "do submit schemes for the future management of the trust and its properties" must be omitted as it is unnecessary and improper to impose a permanent disability to fill the office of trustee on all the defendants and their descendants. Otherwise the appeal is dismissed with costs.

Spencer, J.

Spencer, J. :—This suit was brought for the removal of the defendants from the position of trustees of the Wallajah Masjid at Villupuram, for the recovery from them of the income of the institution alleged to have been misappropriated by them, and for the settlement of a scheme for the future management of the charity. Two questions have been argued at the hearing of the appeal; (1) whether S. 92 of the Code of Civil Procedure is applicable to the facts of this case, and (2) whether the defendants are accountable for the income of the lands after the resumption of the inam.

It appears from an extract from the Inam Register of the District of South Arcot (Ex. A) that this inam was originally granted in 1799 free of tax for building a musjid on the spot where the coffin of Nawab Wallajah rested temporarily while it was being carried to Trichinopoly, for reading namaz and fatehas every Friday, for performing or celebrating the annual ceremony, and for feeding fakirs that may happen to pass by it.

In 1893 the inam was resumed and fully assessed by Government on account of the failure of the grantees to perform the religious service for which it was granted.

The reasons for the resumption do not find place in the Board's Proceedings (Ex. VII) but they appear from the statement of the 1st defendant (Defence witness No. 1) and from Exs. III and IV. The learned District Judge was of opinion that the Government was not acting strictly within its powers in entirely resuming this inam but that it should rather have ensured the due performance of the service

1. (1902) I. L. R 26 M, 339 2. (1907) I. L. R. 30 M. 434.

Muhammad Esuf Sahib v. Moulvi Abdul Sathar Sahib.

Spencer, J.

by changing the muttawalli, which he thinks the Government could have done as being a successor of the original founder.

I do not think that any question of the competence of Government to resume the grant can properly be raised in this suit to which the Government is not a party. There is no doubt that in some instances religious inams are resumed and re-assigned. Board's standing Order No. 54 paragraph 7 sub-divisions 1 and 2 provide for this course being followed where the institution still continues and the service is maintained but the lands have been alienated, or where the institution still continues but the inam has become incapable of application to its original object; but sub-division (2) prohibits re-assignment in cases when the institution has disappeared and the service has ceased and became incapable of restoration.

There is nothing on record to show what considerations influenced the officers of Government in resuming this inam, but presumably they acted according to rule. We only know from Ex. V that when the Mahomedan inhabitants of Villupuram 18 years later petitioned the Government for a re-assignment of the inam, the Collector refused to consider their request after that lapse of time. We have therefore only to consider the effect of the resumption, treating it as an accomplished fact. In *Gunnaiyan* v. *Kamakshi Aiyar* [1], Bhashyam Aiyangar, J., observed that grants of land or land revenue for religious or charitable purposes in this country when made by the ruling authority should be construed not as out and out grants but as reserving a reversion in case of the trust failing. On this principle, he stated, Government has a right to resume the inam if the grantee's family fail to fulfil the objects and conditions of the grant. He added "it is open to the ruling power to resume the grant and appropriate it for other religious or charitable purposes or incorporate it with public revenue. In the latter case Government simply imposes full assessment without extinguishing the right of the family of the grantee in the land and making a fresh grant of it." The learned Judge then proceeds to consider the effect of enfranchisement and to distinguish it from resumption.

The two are distinct processes in their operation on the grantee's interest but we need not follow him into his discussion of their features. This is a case of resumption and resumption means a taking back of what was granted. But in cases like the present, the real question is not so much what was resumed as what was granted in the first instance. We have not the original grant to tell us this directly. But we know what is the presumption that the Government draws in such cases, because that is laid down in the Board's Standing Orders for the direction of officers of Government dealing with cases of resumption, and we are able to know what presumption the Government drew in

1. (1902) I L. R. 26 M. 339.

Muhammad Esuf Sahib v. Moulvi Abdul Sathar Sahib.

Spencer, J.

this particular case from their conduct in simply imposing full assessment and leaving the enjoyment of the land where it was. In the case of ancient grants like this where it does not appear from the title-deed whether it was the land or the assessment that was originally granted, the Government gets over the difficulty of uncertainty as to title and avoids interfering with occupancy rights by requiring the Collector to report who is the actual occupant of the land and by *treating the inam subject to resumption as a grant of the assessment on the land* and fully assessing it in the name of the occupant. It is only in the case of grants made within 60 years of resumption proceedings, when there is *prima facie* evidence that the grant was of the land also, that any steps are taken to resume the land and interfere with the enjoyment of the person in possession. That these are the principles governing the action of Government is evident from Board's Standing Order No. 54 paragraphs 4 and 5. I agree with the learned Judges who decided *Punniah* v. *Kottamma* [1], that in cases of resumption of charitable inams the land that was previously the property of the trust becomes the property of the person to whom Government grants it, and that it is within the discretion of Government to grant land which it has resumed to the former trustee or to any other person.

If then resumption in the words of the Privy Council quoted in *Sreevadhu Yerranna* v. *Donkira Kannamma* [2] "consists in putting an end to the grant, remitting the services and requiring them (*i.e.*, the grantees or their heirs) to pay the full assessment," what is the effect on the rights of the defendants to dispose of the land which was trust property, and its income? There is nothing to show that the lands were waste before the grant. The grant was more than 60 years old at the time of the resumption. The lands have now been incorporated with *ayan*, and an ordinary ryotwari patta has been issued to them which carries with it no obligations beyond the payment of the assessment. The restriction on alienation has been removed from the properties, which were before inalienable on account of the religious services for which they were intended to be a support; transfers of the pattadar's interest are recognized by the Government and the holding is hereditary in the ordinary way according to the personal law of the holder. The natural inference is that the grant must be taken to have been a grant of the assessment, that on full assessment being imposed nothing was left for the trust, that the Government, which represents the grantor, released the grantees from their obligation to render service from the moment that resumption took place and that the trust is at an end. It may be that the holders of service and religious inams are by these means able to take advantage of their

1. (1916) I L R 40 M. 989. 2. (1911) I. L. R. 35 M. 704 at 703.

Muhammad Esuf Sahib v. Moulvi Abdul Sathar Sahib.

Spencer, J.

own default but this is a matter for consideration of the Government and not of the Civil Courts, whose function is only to declare the law as it stands. See the observations of the Judicial Committee in *Balakrishna Udayar* v. *Vasudeva Aiyar* [1]. Moreover as full assessment is now being paid I am doubtful whether there has been any real advantage accruing to the defendants in consequence of the resumption. The second and fourth issues must therefore in my opinion be answered in the negative.

I am further of opinion that the suit must fail on the first issue also, though I admit that this question does not admit of easy solution.

Mr. Ameer Ali in his book on Mahomedan Law at page 561 distinguishes between public wakfs and quasi public or private wakfs and states that a Mahomedan mosque, unless it is a masjid-i-Jumma, is not regarded by Mahomedan Lawyers to be vested in the public. In this passage and in his commentary on the Civil Procedure Code the learned author declares that S. 92 of the Code of Civil Procedure has no application to private or quasi public trusts. In the present case we have the statement of the kazi of Villupuram (D. W. 3) who ought to know the facts, that this Wallajah mosque is not called a Jumma Masjid, that is, a mosque where congregational worship is held. In Ganapathi Aiyar's Religious Endowments at page C XIX to C XXV the distinction between public and quasi public trusts made by Mr. Ameer Ali is said to be unwarranted, but the latter's authority on questions of Mahomedan Law is in my opinion so great as not to be lightly disregarded. In *Sikhandar Rowther* v. *Secretary of State* [2], the Begumpur mosque at Dindigul was decided to be a public trust, although the learned Judges held in that case, to which Government was a party, that Government were justified in resuming the inam. That was a grant of two whole villages as inam for the upkeep of a mosque and a durga. In *Rengachariar* v. *Pranatharthiharachariar* [3], an inam granted for the support of the hereditary office holders in a Hindu temple was held to be not a religious trust of a public nature. No doubt each case must depend on its own facts and therefore other decisions do not help us much in determining this case, but looking to all the known circumstances connected with the grant and the resumption of this inam, its registration not in the name of any institution but in the name of an individual grantee, the statement of D. W. 3 and other evidence, I am of opinion that this is not a public trust of the kind to which S. 92 of the Code of Civil Procedure is applicable. On these two grounds I think that the appeal should be

1. (1917) I. L. R. 40 M. 793 at 803=33 M. L. J. 69. 2. (1916) 5 L. W. 402.
3. (1915) 18 M. L. T. 122.

Muhammad Esuf Sahib v. Moulvi Abdul Sathar Sahib.

Spencer, J.

allowed and the suit dismissed with costs here and in the District Court.

Under S. 98 of the Code of Civil Procedure, the appeal is dismissed with costs.

[On Letters Patent Appeal.]

T. R. Ramachandra Aiyar, G. S. Venkatarama Aiyar and *S. Rangachariar,* for Appellants.

C. Padmanabha Aiyangar, for Respondents.

The Court delivered the following

Ayling, J.

Judgments :—*Ayling, J.*:—The 1st question for consideration in this case is obviously the nature of the original grant which it is common ground was made by the Nawab of the Carnatic in 1798; and I have no hesitation in agreeing with my lord the Chief Justice that it was of the nature of a public trust for the benefit of a mosque founded, endowed and dedicated for public worship. In the absence of the parvana, we have to look to the record in the Inam Register, Ex. A, and to the evidence of user. Both are strongly in plaintiff's favour. I attach no importance to the statement of D. W. 3 that the mosque is not called a Jamma Masjid in the face of the evidence that it has always been used for public worship. Ex. A shows clearly that the inam was a religious endowment for the establishment and up-keep of a mosque and various services therein, and that the persons named in columns 16-20 as "present holders" are so treated as managers of the masjid and not in their individual capacity.

Indeed the only ground on which the public character of the trust has been seriously attacked is the fact that it was treated by the British Government as resumable, and that under Mahomedan Law a *wakf* must be unconditional. No authority has been quoted which as far as I can see, supports the contention that in the case of a grant by the ruling power the condition of power of resumption in case the trust is not carried out, impairs the public character of the trust. We have been referred to a passage at p. 526 of Vol. I of Ameer Ali's Mahomedan Law which says:

"If a person were to create a *wakf* and make a condition that the property should return to him in case of necessity, the condition would be valid and the *wakf* would be void, the transaction taking effect as a mere *hubs* or settlement; when the need arises the property would revert to the owner." This has

Muhammad Esuf Sahib *v.* Moulvi Abdul Sathar Sahib.

Ayling, J.

reference to a totally different state of things. A contingency of reversion to the owner, in case the latter needs the property, obviously implies, only a temporary settlement, which can be annulled although all its other conditions are rigorously complied with. In *Kuttayan* v. *Mammanna Ravuthan* 1, the only case to which we were referred as being in appellant's favour, there was no question of resumability, but of the existence of outstanding private rights in the alleged wakf property. In *Sikkandur Rowthan* v. *The Secretary of State for India* 2 a very similar case to the present, Srinivasa Aiyangar, J., and myself held that land forming the subject of a public trust was resumable by Government on failure to perform the conditions of the trust.

I would therefore reject this contention and may add that in any case it could not be applied to a grant by the British Government while there is no evidence attaching a specific condition of resumability to the original grant by the Nawab. The earliest evidence is the entry in the Inam Register, Ex. A dated 1861.

It only remains to consider the nature and effect of the proceeding of Government in 1893 by way of resumption. There appears to have been considerable argument before the Divisional Bench as to whether the original grant was of the lands themselves as held by the Chief Justice or only of the assessment, thereon. Before us the learned Vakil for appellants did not contest the view taken by the Chief Justice on this point, but was content to argue his case on the hypothesis that the lands themselves constituted the grant.

But if this be so, appellant's case is hopeless, whichever view be taken of the extent of the interest resumed by Government. If, as both the learned Judges of the Divisional Bench held, Government only resumed its right to collect full assessment on the land then the remaining interest in the land remained as much the subject of the trust as ever. If on the other hand, it be held that Government took back all that it had granted (*i. e.*, the ryots' interest as well as its own right of collecting assessment) and made a re-grant of the ryots' interest to the trustees in their individual capacity, then the principle embodied in S. 88 of the Trusts Act comes into effect. There can be no

1. (1911) I. L. R. 35 M. 681.

2. (1916) 5 L. W. 402

Muhammad Esuf Sahib v. Moulvi Abdul Sathar Sahib.

Ayling, J.

question that by such a transaction the trustees would gain for themselves a very valuable proprietary interest in the property which interest previously appertained to the trust. This interest would have been acquired by the simple process of neglecting their duty as trustees, whereby Government was driven to resume the inam. In such circumstances the advantage they gained must be held by them for the benefit of the trust. It is argued that the trust had ceased to exist but this cannot be the case. Apart from the cultivable lands which formed the endowment of the mosque there is the mosque itself and the site on which it stands which latter also formed part of the original grant. It cannot be seriously suggested that the site of the mosque was assessed and, with the mosque upon it, regranted to the defaulting trustees for their private use. There is certainly no evidence to prove that such was the case and as long as the mosque and the site remained unaffected the trust cannot be said to be extinguished. I would dismiss the appeal with costs.

Kumaraswami Sastri, J.

Kumaraswami Sastri, J.:—I am of opinion that the decision of the Chief Justice ought to be affirmed. There can be little doubt from the inam title-deed that the inam was granted by Nawab Azim Jah in Fasli (1208) (1798) for the purpose of erecting a Musjid, for keeping a light burning every night, for reading the Namas and Fatehas every Friday, for performing the annual ceremony (of the Nawab whose coffin rested on the spot where the Musjid was to be built on its way from Madras to Trichinopoly) and for feeding the Fakirs. It does not appear that it was the intention of the grantor that the trustee should obtain any personal benefit or that he should appropriate any portion of the income of the lands. The land is classed as a religious endowment in the inam register and this is, as pointed out in *Muhammad Jafar* v. *Muhammad Ibrahim* [1], strong evidence that the property was subject to a public trust. The persons in possession are described as managers of the Musjid. The 1st defendant and his witnesses in their evidence state that the lands were *manyam* lands assigned to the mosque. I see no reason to hold that the mosque is not a public mosque and that the grant of the inam was to the grantees personally as a service inam. It is conceded before us that the grant was of both the melwaram

1. (1900) I. L. R. 24 M. 243.

Muhammad Esuf Sahib v. Moulvi Abdul Sathar Sahib.

Kumaraswami Sastri, J

and kudiwaram of the land. In the absence of evidence as to what was actually granted the recent decision of the Privy Council in *Suryanarayana* v. *Potanna* [1], is to the effect that in grants by Native Rulers there is no presumption that only the melwaram was granted.

It is also clear that a mosque was built and that the trusts were carried out till at least 1861 as the remark in column 8 of the inam register is to the effect that the conditions were all regularly fulfilled. It also appears that the trusteeship was hereditary. As to what happened between 1861 and 1893 (the date of resumption by Government) the evidence is not clear. The probabilities are that, having got the recognition of the British Government during the inam settlement proceedings, the trustees gradually neglected their duties and treated the inams as their private property.

In 1893 an enquiry was held and in consequence of it full assessment was levied on the lands. Ex. VI shows that a total tirvah of Rs. 123-8-0 was levied on the lands which are said to consist of 2 acres 99 cents of punjah and 16 acres 70 cents of nanjah. It is argued that the levying of this assessment had the effect of putting an end to the trusts, and the grant of the lands as the private and absolute property of the grantees. I do not think this consequence follows. All that the Government did was to levy the full assessment on lands which were free from it. The kudiwaram rights on the lands were not affected and as the grant in inam was of both varams it is difficult to see how the levying of the assessment can put an end to the trust. At the most all that can be said is that by levying full assessment the income of the trust properties was reduced by the amount of the tirvah levied. Reference was made by the appellant's vakil to *Unide Rajah Raji Bommarauzi Bahadur* v. *Pemmasami Venkatadry Naidu* [2]. In this case the inam was a service inam and the grant seems to have been of the melwaram in return for services. The levying of the assessment had therefore the effect of putting an end to the tenure. In the present case the grant in inam was of both the warams and I cannot from the mere fact of the levying of full assessment and the grant of a patta to the trustees, hold that there was a resumption of both the warams by the Government which extinguished

1. (1918) I. L. R. 41 M. 1012. (P.-C.) 2. (1858) 7 M. I. A. 128.

Muhammad Esuf Sahib v. Moulvi Abdul Sathar Sahib.

Kumaraswami Sastri, J.

the trust and a regrant to trustees of an absolute estate freed from all obligations. The case in *Punniah* v. *Kotamma* [1] is distinguishable as the resumption was assumed to be of both the warams.

It has been argued that no valid wakf was ever created as the lands were resumable at the option of the grantor if the trusts were not performed by the grantees of the inam. Reference has been made to Ameer-Ali's Mahomedan Law, Vol. I, page 526. The original grant is not produced and no satisfactory explanation has been given for its non-production. That such a document existed appears from the inam register which refers to "documents in Persian with Parvana." There is therefore nothing to show that a right of resumption existed in the original grant constituting the wakf. I doubt very much if the limitations which would apply to grants by private individuals would apply to trusts created by sovereign rulers but assuming it is so there is nothing to show that there were any terms or conditons in the Parvanah issued by the Nawab of the Carnatic which are repugnant to Mahomedan Law. What the British Government did in 1861 was to confirm the grant. A clause was added that the inam would be "continued so long as the conditions of the grant are regularly fulfilled," but this clause cannot render a valid wakf already created invalid nor can the inam proceedings of 1861 be taken to amount to the creation of a new wakf. Assuming it to be so the trust would be one created by the British Government and the law as to wakfs would not apply to trusts created by a non-Mahomedan State. I am also of opinion that S. 2 of the Crown Grants Act, Act XV of 1895, which provides that all provisions restricting conditions and limitations contained in grants by the Crown shall take effect according to their tenor notwithstanding any rule of law to the contrary will validate the grant as the Act is retrospective.

There can be little doubt that full assessment was levied by the Government because the then trustees did not carry out the trust. Assuming that there was a regrant of both the warams to such trustees the case will fall under S. 88 of the Trusts Act. Having regard to the Standing Orders of the Board of Revenue the grant in cases where inams are resumed,

1. (1916) I. L. R. 40, M. 939.

Muhammad Esuf Sahib v. Moulvi Abdual Sathar Sahib.

Kumaraswami Sastri, J.

is, as pointed out by Spencer, J., ordinarily to the persons in possession and the patta was issued to the trustees because they were in possession of the lands. I agree with the Chief Justice that the Government can hardly have intended to reward the defaulting trustees by conferring on them an estate free from the trust. The Government had waived its right to levy assessment on condition that certain trusts were performed and on failure by the trustees it levied full assessment. The patta was issued to the trustees because they were in possession as trustees and not because of any special claims they had apart from the trust. The trustees who were bound to carry out the trusts therefore gained an advantage by their breach of trust and they must hold the land for the benefit of the trust.

I would dismiss the appeal with costs.

Krishnan, J.,

Krishnan, J.:—The first question for our decision in this case is whether the plaint mosque is a trust created for public purposes within the meaning of S. 92 Civil Procedure Code.

The nature of a trust has to be judged primarily from the terms of the deed of endowment creating it. But in the present case the parvanah by which the trust was created is not produced. The appellants pretend that they have lost it but I am unable to believe it. I am inclined to think it is kept back as its production would work against their interests and therefore every presumption should be drawn against them on the question at issue.

In the absence of the original deed of trust we have to fall back upon what appears in the extract from the Inam register of 1861, Ex. A and on the usage in the institution. Ex. A shows that the grant was made in Fasli 1208 or A. D. 1798 by the order of the then Nawab of Carnatic for the purpose of building a Musjid on the spot where the coffin of Nawab Wallajah rested on its way to Trichinopoly for keeping a light in it, and for reading Namas and Fatehas on every Friday, for performing the annual ceremony of the Nawab's death, and for feeding fakirs who pass by. No doubt the object so stated and the fact that the inam was to be continued only so long as the conditions were fulfilled are in favour of the appellants' argument that the inam is a service inam. But the inam is not described as a service inam in the deed but it is stated to be a "religious endowment" and the lands are said to be enjoyed by

Muhammad Esuf Sahib v. Moulvi Abdul Sathar Sahib.

Krishnan, J.

the persons then in possession as "Managers of the Masjid." These circumstances rather support the contention that the endowment is a public one. I am, however, not prepared to go as far as my learned brothers that they are conclusive of the question at issue. It seems to me that no definite inference can safely be drawn from Ex. A by itself as to the character of the trust.

But I consider the matter is put beyond doubt by the usage in the institution as proved by the evidence in the case. Several witnesses speak to the mosque being open to the Mahomedan public for worship. The 1st defendant himself had to admit that "the people had a right to worship in the mosque." He seems to have also been fined once for interfering with public worship in it, see Exs. B and B 1. It is also proved that there is a Peshi Imam and Katib and a Muazzin for the mosque. P.W. 1 swears that he is the holder of the 1st two offices and P. W. 3 claims to be the Muazzin. The 1st defendant admits the existence of these offices though he claims to hold them himself. P W. 1 also swears that he was in the habit of preaching a Katib from the "Inimbar" or pulpit regularly to congregations of Mahomedans. In these circumstances it seems to me idle to say that the mosque is not a public one. I therefore agree that the finding arrived at by the District Judge and supported by his Lordship the Chief Justice and by my learned brothers now, that the mosque is a public trust should be adopted. As pointed out by the learned Chief Justice this view is supported by the ruling in *Sikkanda Rowthan* v. *The Secretary of State for India* [1], where under similar circumstances a similar inference was drawn.

It was next contended by the appellant's vakil that as the grant was confirmed and continued by the British Government by Ex. A, only subject to the conditions of the grant being fulfilled, it became an invalid wakf, as under the Mahomedan Law the grantor cannot retain any interest in a valid wakf; and reliance was placed on Ameer Ali's Mahomedan Law, Vol. I page 526. This argument is clearly fallacious. In the first place the Government was creating no new trust at all by Ex. A. They simply confirmed the previous grant, imposing certain conditions, as they were entitled to do, as the ruling

1. (1916) 5 L. W. 402.

Muhammad Esuf Sahib v Moulvi Abdul Sathar Sahib.

Krishnan, J.

power in the land. In doing so, they did not act as the representatives of the Nawab who was the original grantor nor did they purport to make a new grant themselves. In the second place, if we take it that they did make a new grant obviously the Mahomedan Law of wakf cannot apply to it. In any case therefore the objection is futile.

It was finally contended by the appellants' vakil that the resumption proceedings in 1893 put an end to the inam in question and as the lands were granted to his clients' predecessor-in-title on an ordinary ryotwari patta they became his private property. On this question the learned Chief Justice and Spencer, J., have taken different views, the former holding that it did not affect the trust and the latter that it did. I am inclined to agree with the view of his Lordship the Chief Justice.

It is admitted before us that the lands themselves formed the inam and not merely the revenue payable on it. As the note of the fact in the Inam Register Ex, A, states that the "whole inam has been resumed." I am not able to adopt the suggestion that the resumption was only of the melwaram right and that the kudiwaram still remained as it was before. But even taking that the lands themselves were resumed, I think it really makes no difference to the result of the case.

If the Government had granted the lands to a stranger without expressly providing for the trust to attach to them, it may be they would have become the ordinary private ryotwari property of the grantee. But the grant in this case was to the Muttawallis themselves and apparently on the ground that they were such Muttawallis. In such a case it seems to me a fair inference to draw that the Government intended that the lands should be held under the same conditions as before subject to the one exception that full assessment was to be paid. In fact the considerations mentioned by Spencer, J., regarding resumption in the case of ancient grants show that where the Government merely levy full assessment they do not intend to interfere with the existing rights ; and therefore where they purport to resume the land and re-grant it to the same trustee on full assessment, it is clearly right to hold that they intended by their re-grant that the lands should be held subject to the same rights as before resumption.

Muhammad Esuf Sahib v. Moulvi Abdul Sathar Sahib.

Krishnan, J

The case of *Punniah* v. *Kottamma* [1] relied on by the appellant's vakil does not seem to me to be in point here. In that case both parties were agreed that the charitable trust had come to an end by the resumption proceedings; in fact the claim was for a share on the footing that the property had become private property. In such a case the learned Judges held that the re-grant to a person who happened to be one of the trustees did not lead to a presumption that it was given to him because he was a trustee or that he took it jointly for himself and the other trustees; for if that was the intention of the Government the grant would have been to all the trustees. Whether this view be correct or not it is not in conflict with the view that where the grant is not inconsistent with an intention to preserve the trust such intention may be presumed.

I agree with the view taken in *Sikkandar Rowthan* v. *The Secretary of State for India* [2] which is followed by the learned Chief Justice in this case that where lands have been dedicated for the support of a public mosque their resumption and re-grant to the trustees on full assessment do not free them from the trust.

I am prepared to support my conclusion in his case on another ground as well. It is proved here that it was entirely due to the failure of the Muttawallis to perform their duties properly that led to the inam being resumed and the lands being re-granted on full assessment. In these circumstances I am of opinion that, even though the resumption proceedings be taken to have resulted in freeing the lands from the trust in the hands of the Government, the trust re-attached to them when they were given back to the muttawallis on the principle underlying S. 88 of the Indian Trusts Act, though that Act does not directly apply to public religious endowments. Otherwise as the learned Chief Justice remarks "we would in effect be rewarding the defaulting Muttawallis for their breach of duty." S. 88 embodies a principle which is of general application, that if a trustee avails himself of his character as such to gain an advantage thereby he must hold it for the beneficiaries. It is quite clear in this case that it was by taking advantage of their position as Muttawallis and failing to do their duty as such, that they led the Government to resume the lands and re-grant them to them. They

1. (1916) I. L. R. 40. M. 939.

2. (1916) 5 L. W. 402.

Muhammad Esuf Sahib v. Moulvi Abdul Sathar Sahib.

Krishnan, J.

cannot be allowed to take advantage of their own default and to treat the lands as private property in their hands.

I therefore find on the 1st issue that the Wallajah Musjid of Villupuram is a public religious institution to which S. 92 Civil Procedure Code applies and on issues 2 and 4 that the lands are trust properties belonging to Musjid and that defendants are accountable for the income. The amount decreed by the lower court has not been seriously disputed before us.

I agree with the learned Chief Justice that the decree of the District Judge should be modified as he proposes as it is not right to exclude the defendants and all their descendants from filling the office of trustee for ever. Adopting that modification which has already been incorporated in the decree of this court, I agree in dismissing the appeal to us with costs.

A. V. V.

PRIVY COUNCIL.

PRESENT :—LORD BUCKMASTER, LORD DUNEDIN; SIR JOHN EDGE AND SIR LAWRENCE JENKINS.

[On appeal from the High Court of Judicature at Madras.]

P. C.

Raja Partha-saradhi Appa Rao v. Raja Bomma-devara Satya-narayana.

Raja Parthasaradhi Appa Rao and others ... *Appellants.**

v.

Raja Bommadevara Satyanarayana ... *Respondent.*

Land-law of Madras—Acquisition of occupancy rights—Estate—Permanently settled estate or temporarily settled Zemindari—Formal settlement necessary—Madras Estates Land Act, 1908 (*Mad. Act I of* 1908) *Ss.* 3, 6, 8.

The settlement referred to in the definition of "estate" in the Madras Estates Land Act, 1908 (Madras Act I of 1908), S. 3, must be effected formally and there must be some recorded evidence of it.

Where therefore certain Government lands were transferred to a Zemindar in lieu of monetary compensation or reduction of revenue for the acquisition by Government of other lands forming part of a settled estate, and it was sought to infer therefrom a settlement of the new lands.

Held, that no such inference should be made, and that there was nothing to give the new lands the character of a settled estate.

Zemindar of Sanivarappet v. *Zemindar of South Vallur* [1] affirmed, but on different grounds to those assigned by the Madras High Court

Appeal from a decree of the Madras High Court (Wallis, C. J. and Seshagiri Aiyar, J.), dated November 2, 1915, affirming a decree of the District Judge of Kistna.

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* 22nd October, 1918.

1. (1916) I. L. R. 39 Mad. 944.

P. C.
Raja Parthasaradhi Appa Rao
v.
Raja Bommadevara Satyanarayana.

The facts of the case are sufficiently stated in their Lordships' judgment and in the report at 39 Mad. 944 *Zemindar of Sanivarappet v. Zemindar of South Vallur.* The suit was brought by the Zemindar, plaintiff-respondent, for the ejectment of his tenants, defendants-appellants, who claimed to have acquired occupancy rights by virtue of S. 6 of Madras Act I of 1908. The District Judge of Kistna, Mr. F. A. Coleridge, on the first and main issue, "Whether the suit lands are still Government jerayati lands as alleged in the plaint or they are ryoti lands as alleged by defendants," observed as follows :—

"The suit lands undisputedly were not part of a permanently settled estate at the time that Government made them over rent-free to the Zemindar. The question is could they lose their ryotwari nature by being so handed over to a Zemindar and acquire a Zemindari status so as to come within the terms of the Estates Land Act. They would have to be part of a permanently settled estate as defined in S. 3 (2) of the Act to come within that Act.

"To be part of a permanently settled estate they would have to come within an estate settled by a sanad under Regulation 25 of 1802. To be so constituted, a sanad must be signed by the Governor-in-Council *vide* the form in the XLII Appendix of Vol. 2 of the Board's Standing Orders. These lands were never so granted but at the most were granted by the Board of Revenue and the two Collectors of the Kistna and the Godavari. I am therefore of opinion that these lands were not constituted a permanently settled estate.

"All the Board and the Collectors did was to take from the Zemindar certain of his Zemindari lands on which the peishcush was fixed at Rs. 777-5-3 on one block of land acquired and a sum not clear on the other *vide* Exhibit XXIV and to grant him certain ryotwari banjar lands bearing the same amount of shist in exchange so that the peishcush he had to pay did not decrease though as I read the regulations part of the amount due from the Zemindar is now peishcush and part is ryotwari shist.

"It was an arrangement that suited the Zemindar as he got waste land which would be capable of devlopment and not cash which would soon have been spent or a reduction of peishcush which would have meant a loss of prestige as it would mean a loss of area under him and it suited the Government as stated by the Board to give land rather than to pay cash.

"It may be noted that under Act 10 of 1870 a reduction of peishcush could only be made, as compensation for land taken up, with the consent of the Zemindar and in this case the Zemindar refused to accede and therefore Government must have paid him cash or given him land in lieu of cash."

P. C.

Raja Partha-saradhi Appa Rao v. Raja Bomma-devara Satya-narayana.

"I hold therefore that the Board of Revenue in giving the Zemindar other lands instead of money compensation they would have had to pay, merely gave him ryotwari lands and that the grant did not in any way convert them into a part of the Zemindar's permanent estate for, firstly that estate must be fully described in the sanad and, secondly, the accounts thereof gone into fixing an assessment on all the lands in it liable to pay assessment before the permanent assessment can be arrived at and a sanad granted. Land that was not taken into account in fixing the assessment cannot come within the sanad and as the same was a deed of permanent property, the introduction of other lands could only be done by a deed duly executed and that has to be by the Governor-in-Council.

"The mere fact of entry in Government accounts as Zemindari or the mere leasing out by the Zemindar as Zemindari would not alter their character in the least if it was beyond the power of the Board of Revenue and the Zemindar to enter into any agreement without the sanction of the Governor-in-Counoil.

"My finding on issue 1, therefore, is that the lands granted to the Zemindar remained jerayati or ryotwari lands and did not become part of the lands of a permanently settled estate so as to come within the provisions of the Estates Land Act."

The District Judge accordingly decreed this suit, and his decree was confirmed on appeal by the Madras High Court for reasons stated in the judgment of Seshagiri Iyer, J. reported at I. L R. 39 M. 944.

Defendants preferred this further appeal to the Privy Council.

De Gruyther, K.C. (*J.M. Parikh with him*) for appellants submitted that the case fell within sub-section (1) to S. 6 of the Madras Estates Land Act, 1908 (Madras Act I of 1908). Some of the zemindar's old land, which was permanently settled, was acquired by Government under Act X of 1870. He requested that instead of money land should be given him. This was done. We submit that this substitution did not alter the condition of the lands that the new lands: which the zemindar got in exchange became permanently settled estate just as the old lands were. In a recent case from Oudh when there were accretions to a taluq subject to a special rule of inheritance, it was held that the succession to such accretions followed the same rule. *Rajindra Bahadur Singh* v. *Rani Raghubans Kunwar*. [1]

The Zemindar lost his rights as a ryot under S. 8 (1) of the Estates Land Act as soon as he became interested in the land as landholder ; the High Court erred in holding that S. 8 (1) was overridden by the explanation to S. 6 (6).

There is the further point, on which the District Judge decided against us, that no sanad was granted to the zemindar

1. (1917) L. R. 45 I. A. 134=I. L. R. 40 A. 470.

P. C.

Raja Parthasaradhi Appa Rao v. Raja Bommadevara Satyanarayana.

within the terms of S. 3 of Madras Regulation XXV of 1802. The preamble of that Regulation uses the word "grant," but it is settled law that the sanads referred to merely recognised existing rights.

Collector of Trichinopoly v. *Lekkamani.* 1

(*Lord Buckmaster*: Has the plaintiff any title at all as landholder? Where is his conveyance?)

[*Sir Erle Richards* referred to the Crown Grants Act, 1895 (Act XV of 1895) S. 2: The Transfer of Property Act does not apply.]

Usually the transfer is carried out by executive orders of the Board of Revenue. The record shows this is what happened here.

(*Lord Buckmaster*: Is there anything to show on what terms the new lands were to be held?)

The old lands bore a peishcush of Rs. 777 and the effect of the transfer was that the new lands took their place: they became an estate settled at Rs. 777.

(*Lord Buckmaster*: That is mere speculation.

Sir Erle Richards, K. C. and *Kenworthy Brown*, for respondent, were not called on.

Their Lordships' judgment was delivered (November 1, 1918) by.

Lord Dunedin.

Lord Dunedin:—The respondent is zemindar of certain lands in the village of Satrampadu. The lands were let on 11th August, 1903 on a five years' lease to the appellants. At the expiry of the term the lease was prolonged for a further period of three years. At the expiry of the three years the respondent wished to resume possession, but was met by the assertion that the appellants had a permanent right of occupancy in virtue of the provisions of the Madras Estates Land Act which was passed in June, 1908, and came into force on 1st July of the same year. This suit was then raised to recover possession and to get mesne profits.

The provision of the Act on which the appellants rely is the 6th section which says that every ryot now in possession or who shall hereafter be admitted by a landholder to possession of ryoti land not being old waste, situate in the estate of such landholder, shall have a permanent right of occupancy in his holding. "Estate" is defined as meaning (in addition to certain definitions which would not apply in the present question): "any permanently settled estate or temporarily settled zemindari." The respondent says that his estate does not fall within this definition.

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3. (1874) L. R. 1 I. A. 282.

P. C.

Raja Partha-saradhi Appa Rao v. Raja Bomma-devara Satya-narayana.

Lord Dunedin.

The facts as to the estate are as follows. The respondents' predecessor was zemindar of a settled estate situate in another district. Parts of this estate were taken by the Government under the Land Acquisition Act for the purpose of making drainage canals, etc In terms of the Act the landholder was entitled to be compensated. This compensation might have been made by payment of a sum of cash down, or, if the landholder consented, by a reduction of the *peishcush* settled on the estate. The value of the lands taken was investigated ; it was brought out that compensation would be fairly settled by a remission of Rs. 777 out of a total *peishcush* of Rs. 35,588. The landholder then presented a petition to the Government praying that instead of the *peishcush* being *pro tanto* remitted, he might be given some Government lands in another district of which lands he had already acquired the ryoti rights. This was acceded to, and accordingly no remission was made of the *peishcush*, which continued to be exacted as formerly, but by order of the Collector the new lands were transferred to the landholder and were entered in the register as zemindari lands instead of Government lands as formerly. These are the lands which were let to the appellants. The question therefore is, are these lands part of a permanently or temporarily settled estate ? It is obvious that when in the hands of the Government they were not so. What then has made them acquire the character of a settled estate? The appellants' Counsel argued that the effect of the transaction detailed above was to make the lands an estate settled at a *peishcush* of Rs. 777. But a settlement must be effected formally and there should be some recorded evidence of it. It seems impossible here to point to anything which has that effect. There is admittedly no sanad dealing with the lands in terms of the article of the Regulations. That in the opinion of the learned District Judge was *per se* conclusive. It is, however, enough to say that there is nothing to which the appellants can point as making a settlement. There being no document and the matter being left to inference to be drawn from the facts, it would be possible to suggest more than one mode of settlement. There is the view as just stated, which was pressed by the appellant's Counsel, which would amount to a separate settlement of the new lands at a *peishcush* of Rs. 777, and a reduced *peishcush* of Rs. 34,811 on the old lands. But

P. C.

Raja Partha-saradhi Appa Rao v Raja Bomma-devara Satya-narayana.

Lord Dunedin.

it would be equally easily suggested that the new lands became an integral part of the old lands at a total *peishcush* of Rs. 35,588 ; or again that the new lands were settled at *nil*, leaving the original *peishcush* as it stood. There is no reason to prefer any one of these theories to the others. Yet the question of what lands could be sold to discharge the debt of an unpaid portion of the *peishcush* of Rs. 35,588 would necessarily depend on which was the true view. This uncertainty is fatal to the idea of a settlement having been made.

This disposes of the case, and is substantially the ground on which the learned District Judge decided it. The High Court went upon different reasons, with which their Lordships are not prepared to agree, but as the result at which they arrived was the same, no alteration need be made, and their Lordships will humbly advise His Majesty to dismiss the appeal with costs.

Solicitor for appellant :—*E. Dalgado.*

Solicitor for respondent :—*The Solicitor, India Office.*

A. P. P.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT: —MR. JUSTICE PHILLIPS AND MR. JUSTICE KRISHNAN.

Yuna Ramanayakudu and others ... *Appellant* * (*Defendants Nos. 5 to 8.*)

v.

Boya Pedda Basappa and others ... *Respondents* (*Plaintiff and Defendants Nos. 1, 2 and 4.*)

Yuna Ramanaya-kudu v. Boya Pedda Basappa.

*Civil Procedure Code—S. 64—Applicability.—Order for attachment of property of Judgment-debtor—Alienation of same by him after order but before actual attachment in pursuance of Or.21, R. 54—Validity—*Bona fides *of alienee if material—"Attachment has been made" in S 64—Meaning.*

Where, after an order for attachment of certain immoveable property of the judgment-debtor but before the actual attachment thereof made in the manner provided by Or. 21, R. 54 of the Code, the judgment-debtor executed a lease-deed in respect of the property, *held* that the lease was not invalid under S. 64 of the Code, because, prior to the date thereof, an attachment of the property had not been made within the meaning of S. 64.

Under S. 64 of the Code no question of the *bona fides* of the alienee arises.

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* S. A. No. 511 of 1918. 17th January 1919.

Yuna Ramanayakudu v. Boya Pedda Basappa

Second appeal against the decree of the Court of the District Court of Kurnool in A. S. No. 3 of 1917, preferred against the decree of the District Munsif of Kurnool in O. S No. 562 of 1915.

P. R. Srinivasa Aiyangar and *K. S. Ganesa Aiyar* for Appellants.

E. S. Chidambaram Pillai, for Respondents.

The Court delivered the following

Judgment:—S. 64 of the Code of Civil Procedure says that "where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all the claims enforceable under the attachment." The only question for decision in this case is whether on the date of plaintiff's lease the attachment had been made. No doubt an order had been passed a few days before the lease ordering attachment, but O. XXI R. 54 of the Code of Civil Procedure lays down the manner in which an attachment of an immoveable property has to be made, and those provisions were not complied with until long after the lease was executed. It is contended that the mere writing of an order to attach is sufficient to constitute attachment, but the rule says that the order must be one 'prohibiting' the judgment-debtor and we think that in order to make an order prohibitive the person prohibited must have the opportunity afforded by the publication mentioned in clause 2 of R. 54, of knowing that he is so prohibited and the mere writing of such an order behind the judgment-debtor's back and keeping it in the court records would not amount to an order prohibiting within the meaning of R. 54. A perusal of Rr. 43, 44, 46, 47, 48 and 51 to 53 of Order XXI shows that the principle underlying the procedure in each case is to make the attachment known to the person affected by the Order. In this view no attachment of the property had been made in this case and the lower Court's decree is right. Under S. 64 of the Code of Civil Procedure no question of the *bona fides* of the *alienee* arises ; so this aspect of the case need not be considered.

The second appeal is dismissed with costs.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE OLDFIELD AND MR. JUSTICE SESHAGIRI AIYAR.

Angia Kuppier ... *Appellant* (Plaintiff.)*

v.

Periakaruppa Kavundan ... *Respondent (1st defendant).*

Angia Kuppier v. Periakaruppa Kavundan.

Transfer of Property Act.—S. 68 cls. (b) and (c)—Applicability—Usufructuary mortgage—Deed invalid for want of proper attestation—Mortgagee in possession for sometime and then deprived of possession by third parties—Absence of collusion between them and mortgagor—Suit for mortgage money—Maintainability.

Where a mortgagee under a deed of usufructuary mortgage, which was not in proper form owing to want of attestation, was, after being in possession of the property for sometime, deprived thereof by third parties with whom the mortgagor was admittedly not in collusion, and thereupon sued the mortgagor for the recovery of the mortgage money, *held* that he was not entitled to do so.

S. 68 cl (b) had no application to the case because (1) the mortgagor had done no act to deprive the mortgagee of possession and (2) the default referred to in the clause was default anterior to the deprivation and there was no such default in the case,

S. 68 cl. (c) had also no application because the mortgagee had not, prior to suit, called upon the mortgagor to furnish other security. *Ram Narain Singh* v. *Adhindranath Mukerjee* distinguished 1.

Second appeal against the decree of the District Court of Madura in A. S. No. 226 of 1917 preferred against the decree of the Court of the Addl. District Munsif of Madura in O. S. No. 26 of 1917 (O.S. No. 487 of 1916 on the file of the Court of the District Munsif of Melur).

C. S. Venkatachariar, for Appellant.

Respondent not represented.

The Court delivered the following

Judgment :—The undisputed facts are that the 1st defendant executed a deed of mortgage to the plaintiff which was not in proper form owing to want of attestation. After the mortgage, the plaintiff was in possession for some time and then he was dispossessed by defendants Nos. 2 to 4 who claimed the property by title paramount. There is no allegation that the 1st defendant aided or abetted these other defendants in depriving the plaintiff of his possession. Under these circumstances, plaintiff would not be entitled to sue for the mortgage money as such even if the mortgage was in proper form. Reliance was placed upon *Ram Narayan Singh* v. *Adhindra Nath Mukerjee* [1]

* S. A. No. 1270 of 1918. 31st January, 1919.

1. (1916) I. L. R. 44 C. 388=32 M. L. J. 39.

Angia Kuppier v. Periakaruppa Kavundan.

for the proposition that even though plaintiff may not be able to assert his claim as mortgagee, he can claim the money advanced by him on the footing that the mortgagor should refund it. In the case before the Judicial Committee the mortgagor had taken active steps to deprive the mortgagee of his possession. To such a state of circumstances clause (b) of S. 68 of the Transfer of Property Act would in terms apply, provided the mortgage was otherwise enforceable ; but the Judicial Committee held that even though the mortgage *qua* mortgage was not valid, the mortgage money was recoverable. We are not prepared to extend the reasoning of that decision to a case where the mortgagor has done no act to deprive the mortgagee of possession.

Then it was contended that the case fell under clause (c) of S. 68, inasmuch as the mortgagee was deprived of his security by a stranger. If that is taken to be the finding, then, before suing the mortgagor for the money, the mortgagee ought to have called upon the mortgagor to furnish some other security equivalent to the one which he was dispossessed of.

The last argument related to clause (*b*) and it was contended that as the mortgagor did not when called upon defend his title against defendants Nos. 2 to 4, he must be deemed to have been guilty of default which resulted in depriving the mortgagee of his possession. But the default referred to in clause (*b*) must be anterior to the deprivation. The failure to get back lost possession is not within the clause. In *Bola Nuth* v. *Hara Mohan*, [1] the default was at the date of the mortgage. We are not however to be understood as deciding that the failure to observe the conditions mentioned in S. 68 would amount to default on the part of the mortgagor.

We therefore agree with the lower Courts' conclusion, though not with the reasons given by either of them. In the circumstances of the case, we permit the plaintiff to withdraw the suit with liberty to bring a fresh suit for the money, if he is otherwise entitled to it, on his paying all the costs of the 1st defendant incurred up to date within two months from now.

A. S. V.

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1. (1910) 7 I. C. 251.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT: MR. JUSTICE ABDUR RAHIM AND MR. JUSTICE OLDFIELD.

ஸ்ரீ. மு. Venkatachallapathi Aiyar and another, ... *Appellants* * (*Plaintiffs*).

v.

Thavasi Servai (deceased) and others... *Respondents* (*Defendants*).

Venkatachallapathi Aiyar *v.* Thavasi Servai.

Civil Procedure Code O. 34 Rules 2 and 4—Mortgage—Decree for sale—Interest subsequent to date fixed for redemption—Rate of interest—Contract Act, S. 74—Provision for enhanced interest in a mortgage bond, in default of payment on the due date—Not a penalty in the circumstances of the case.

Where the mortgaged property was to be sold on default of redemption by the mortgagor within the period prescribed by the preliminary decree; the mortgagee decree-holder is entitled to subsequent interest on the aggregate amount consisting of the principal, interest and costs declared or found to be payable on the date fixed for redemption. Such further interest is ordinarily to be calculated at 6 °/o but the court has a discretion in the matter.

Where a mortgage bond provided for payment of the principal money with interest at 9 °/o on a particular date and in default, for payment of interest at 12 °/o and it was found that the mortgagor had with the moneys raised by the mortgagee, discharged debts carrying interest at 12 °/o and more, *held* that the provision in the mortgage bond as to the payment of enhanced interest was not penal.

Appeal against the decree of the Court of the Subordinate Judge of Madura in O. S. No. 11 of 1917, dated the 29th August 1917.

K. S. Jayarama Aiyar for Appellants.

M. O. Parthasarathi Aiyangar and *M. O. Thirumalachariar* for Respondents.

The Court delivered the following

Abdur Rahim, J.

Judgments :—*Abdur Rahim, J.*—I do not think the Subordinate Judge was right in treating the provision for payment of interest at 12 per cent in default of payment on the date fixed in the mortgage bond, as penal. The original rate fixed no doubt is 9 per cent. But it is to be borne in mind that the debts to discharge which this mortgage was executed, carried interest at 12 per cent and more. It could not therefore be said that the mortgagees were not justified in stipulating for payment of a higher rate, if the money was not paid as promised.

The second question raised by the appeal is one of some importance. It is whether in a mortgage decree for sale interest should be computed on the aggregate amount found to be

* A. S. No. 409 of 1917. 27th November, 1918.

Venkatachallapathi Aiyar v. Thavasi Servai.

Abdur Rahim, J.

payable on the date fixed for redemption, that is, consisting of principal, interest and costs, or only on the principal, if the ascertained amount is not paid and property has to be sold in consequence. The matter is now governed by O. XXXIV, R. 4 Civil Procedure Code, which read along with rule 2 provides that in case of default the sale proceeds of the property sold shall be applied in payment of what is declared due to the plaintiff for principal and interest on the mortgage and for costs of the suit until the date fixed for payment together with subsequent interest and subsequent costs. This *prima facie* suggests that the subsequent interest is payable on the aggregate amount and not on the principal alone. The form appended to this rule, form No. 4 of App. D to the 1st Schedule of the Code clearly proceeds upon this above interpretation. But in forms No. 7, 8 and 9 which are forms of decrees for sale in cases where there are more than one mortgage, on this property, provision is made for payment of such subsequent interest and costs *as may be allowed* by the court. These forms certainly suggest that the rate of such subsequent interest is left to the discretion of the court and probably also that the court may in a proper case refuse to allow any further interest

Before the present Civil Procedure Code, the subject was dealt with in the Transfer of Property Act, and the question arose as to whether the court had the power to allow interest at all for any period subsequent to the date fixed for payment and as to the proper rate. The Privy Council held in *Sundar Koer* v. *Rai Sham Krishen* [1] that the Calcutta practice of allowing such interest at the court rate, also adopted in this court, in *Subbaraya Ravuthaminda Nainar* v. *Ponnusami Nadar* [2] was right, contrary to the view of the Allahabad High Court in *Amolak Ram* v. *Lachmi Narain* [3]. Their Lordships at page 161 also observed, "They think that the scheme and intention of the Transfer of Property Act was that a general account should be taken once for all, and an aggregate amount be stated in the decree for principal, interest and costs due on a fixed day, and that after the expiration of that day, if the property should not be redeemed, the matter should pass from the domain of contract to that of judgment, and the rights of the mortgagee

1. (1906) I. L. R 34 C. 150.
2. (1897) I. L. R. 21 M. 364.
3. (1896) I. L R. 19 A. 174

Venkatachallapathi Aiyar v. Thavasi Servai.

Abdur Rahim, J.

should thenceforth depend, not on the contents of his bond but on the directions in the decree. It will be observed that according to the practice explained by the Registrar (that is of the Calcutta High Court), which has been followed in this case, the interest is allowed on the aggregate sum, and not merely on the principal money, and this is right if the mortgagee is treated as a decree-holder or judgment-creditor, but would be wrong if the right to the interest depended on the terms of the mortgage-bond. No doubt this reasoning intended to prove that the contract rate was not to be given, but it contains all the same a clear dictum that the practice in Calcutta of allowing interest on the aggregate sum was right.

I have tried to ascertain the practice in the Courts of this Presidency with reference to this matter. It would seem that in the mofussil courts the practice cannot be said to be consistent or uniform. When the High Court in its appellate jurisdiction passes a mortgage decree for sale, the practice seems to be to allow interest at the court rate of 6 per cent. on the aggregate amount. On the Original Side the practice is to provide in the final order for sale, for such subsequent interest and costs as may be allowed by the court, and I understand that an application for the determination of such interest is generally made at the time of confirmation of the sale. The conclusion that I am led to, is that in default of redemption by payment on the date fixed, subsequent interest is to be calculated both on the principal and interest declared or found to be payable on that date, and such further interest is ordinarily to be calculated at 6 per cent. but the court has a discretion in the matter.

The English Law was also discussed at the bar, and so far as I can gather the practice of the English Courts in a foreclosure action is to compute subsequent interest on the aggregate amount, but in other actions such as by way of administration subsequent interest is allowed only on the principal amount, apparently out of consideration for other creditors of the mortgagor. This is what is to be deduced from *Harris* v. *Harris* [1], *Whatton* v. *Cradock* [2] *Brewin* v. *Austin* [3] and *Elton* v. *Curties.* [4] But in my opinion a question like this has to be determined with reference to the provisions of the Civil Procedure Code

1. 3 Atkyins 721.
2. 1 Keen 267 ; 48 E. R. 309.
3. 2 Keen 211.
4. 19 Ch. D. 49.

and the practice of the Courts in this Presidency, if there is a uniform and well established practice.

Venaktachallapathi Aiyar v. Thavasi Servai. Abdur Rahim, J.

There seems to be no special reasons in this case why interest should not have been allowed on the amount found to be due on the date fixed, and I think that such interest should be allowed at the rate of 6 per cent.

The decree of the Subordinate Judge will therefore be modified by allowing interest from the date of default at 12 per cent. instead of 14 annas per mensem decreed by the Subordinate Judge, and also by calculating interest at the rate of 6 per cent. on the aggregate amount, that is, principal and interest calculated as indicated above and on costs, and not merely on the amount of principal as decreed by the Subordinate Judge, from the date fixed for payment, that is 28th February 1918, until realisation. The respondents will pay the appellants the costs of this appeal.

Oldfield, J.

Oldfield, J. :—I agree.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR JOHN WALLIS, CHIEF JUSTICE AND MR. JUSTICE SESHAGIRI AIYAR.

Chinna Venkatasami Naicken ... *Appellant** (*Petitioner*).

v.

Venkatasami Naicken and another ... *Respondents* (*Respondents 1 and 3*).

Chinna Venkatasami Naicken v. Venkatasami Naicken.

Civil Procedure Code—Schedule II—Applicability—Suit—Reference to arbitrators including presiding Judge—Validity—Award by majority and decree thereon—Final and binding nature of decree—Effect of reference in such cases.

Where the parties to a suit pending before a Subordinate Judge agreed to refer the questions of fact and of law arising in the case to the decision of three persons, *viz.*, the Subordinate Judge and two friends of the parties; an award was made by the majority; and a decree was passed thereon by the Subordinate Judge notwithstanding the objections of the defendant to the award, *held* that the second schedule to the Code had no application to the case, that the reference and the award were not illegal on the ground that one of the arbitrators was the Judge himself and that the decree passed on the award was final and binding on all the parties.

Per *Chief Justice*.—A reference of a suit to the presiding Judge must be held to be altogether *extra cursum curiae* and not the less so when two others are joined with him, and the decree passed in accordance with their decision must be regarded as a consent decree, and as not subject to the provisions of the second schedule.

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* L. P. A. No. 70 of 1918. 20th January 1919.

Chinna Venkatasami Naicken v. Venkatasami Naicken.

Per *Seshagiri Aiyar, J.*—Where parties have chosen to entrust their case to a Judge and two others, they must be deemed to have agreed to accept the decision of that body as final and as not being open to the attacks to which otherwise a judgment is liable

Appeal under cl. 15 of the Letters Patent against the decision of the High Court in C. R. P. No. 474, of 1917 preferred against the decree of the court of the Subordinate Judge of Coimbatore in O. S. No. 50 of 1916.

T. R. Ramachandra Aiyar and *L. S Veeraraghava Aiyar*, for Appellant.

K. N. Kumaraswami Aiyar, for *L. A. Govindaraghava Aiyar*, for Respondents.

The Court delivered the following

Seshagiri Aiyar, J.

Judgments :—*Seshagiri Aiyar, J.*:—The suit was for money due upon a mortgage-bond. After the examination of some witnesses the parties agreed to refer the questions of facts and of law arising in the case to the decision of three persons, namely the Subordinate Judge and two friends of the parties. An award was made by the majority. Thereupon an application was presented by the defendant to set aside the award on various grounds. The Subordinate Judge overruled the objections and passed a decree. On this a Civil Revision Petition was filed in the High Court, mainly on the ground that the reference to the Subordinate Judge as one of the arbitrators was illegal and that the whole award was vitiated thereby. Mr. Justice Ayling rejected this contention and dismissed the petition. This Letters Patent appeal is against the learned Judge's judgment.

In my opinion the conclusion of the learned Judge is right. I may at the outset say that it is undesirable that a Judge before whom a case is pending should associate himself with other persons as arbitrators in the case. The Subordinate Judge thought that the second schedule to the Civil Procedure Code applied to the reference. If he was right in this view, when the award is submitted to the court, it would be open to the parties to impeach the character and conduct of the Subordinate Judge as an arbitrator. It is not desirable that a Judge should lay himself open to such a possible impeachment. But I do not think that the second schedule has any application to the case. Mr. Ramachandra Aiyar for the petitioner referred to the order of the reference, and contended that as the reference

Chinna Venkatasami Naicken v. Venkatasami Naicken. Seshagiri Aiyar, J.

was in terms made under the second schedule the entire proceedings were void. The form of the reference is not conclusive of the matter. It is the intention of the parties that has to be looked to. There can be no doubt that the parties desired that the controversy between them should be put an end to by the decision of the three gentlemen to whom they referred the matter. In my opinion, the whole frame of the second schedule shows that references like the present one are not within its purview. Applications may be made for extension of time, for remitting the award, for correcting the award, and for impeaching the partiality of the arbitrators. If a Judge is one of the arbitrators, he cannot in another capacity extend the time, correct his own judgment, and scrutinise his own character. S. 17 of the Civil Courts Act though not in terms applicable to the present case, indicates that what has been done by a Judge in one character or capacity should not be revised by the same officer in another capacity. It may be as pointed out by Lord Halsbury in *Burges* v. *Morton* [1], where a reference is made to a presiding officer the proceedings may be taken to be *extra cursum curiae.* But it does not follow that the rules which govern awards by private persons would be strictly applicable to decisions in which the Judge of the court takes part as a referee. The Lord Chancellor said : "My Lords, it has been held in this House that where with the acquiescence of both parties a Judge departs from the ordinary course of procedure and, decides upon a question of fact it is incompetent for the parties afterwards to assume that they have an alternative mode of proceeding and to treat the matter as if it had been heard in due course." With slight modifications the same language may be applied to what has been done in the present case. Where parties have chosen to entrust their case to a Judge and two others, they must be deemed to have agreed to accept the decision of that body as final and as not being open to the attacks to which otherwise a judgment is liable. An argument was addressed to us based upon S. 89 of the Civil Procedure Code. Clause 1 lays down that 'all references to arbitration whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in the second schedule.

1. (1896) A. C. 186.

Chinna Venkatasami Naicken v. Venkatasami Naicken.

Seshagiri Aiyar, J.

The proviso exempts reference under the Indian Arbitration Act and proceedings under "any other law for the time being in force." No doubt if there is no law which would give validity to the decision of the Judge and of his two colleagues, the proceedings must be taken to have been under the second schedule to the Code of Civil Procedure. In this case I am of opinion that by virtue of O. XXIII of the Civil Procedure Code the present reference can be regarded as being outside the second schedule. The parties have chosen a particular tribunal consisting of the Judge and of two other persons to deal with their contentions. They must be deemed to have agreed to accept their conclusions unreservedly. In other words, it must be regarded that they agreed to *adjust* the suit by the result of the decision of the three persons. This adjustment must be taken to have been reported to the court before which the suit was pending; and the court by virtue of its inherent powers to finally dispose of any matter which is pending before it must be deemed to have passed a decree in terms of the decision reported to it by the three persons. This was practically the view taken in *Nanjappa* v. *Nanjappa Row* [1], and *Pragdas* v. *Girdhardas* [2]. Giving such a finality to decisions is not unknown to the Civil Procedure Code. For example O. XXXVI provides for cases in which a party may state a special case before a Judge who hears the suit. In such cases it has been held that there will be no appeal. Vide *Nidamarthi Mukkanti* v. *Thammana Ramayya* [3]. If the conclusions come to by a Judge before whom a special case is stated can be regarded as final, there is nothing incongruous in giving the same finality to the conclusion come to by a judge who is assisted by two other persons. In my opinion, therefore, although the procedure adopted by the Subordinate Judge in dealing with the matter as if it was a reference under the second schedule and as if the provisions of the Code applied, was wrong, in as much as a decree was passed in terms of the award the defendant as a party to the reference is not entitled to contest its finality and to request that the case should be heard again. On this ground, I am of opinion that the decree of the Subordinate Judge was rightly passed, and that the petition to this court was

1. (1912) 23 M. L. J. 290. 2. (1901) I. L. R. 26 B. 76.
3. (1902) I. L. R 26 M. 76.

rightly dismissed. The Letters Patent Appeal must be dismissed with costs.

Chinna Venkatasami Naicken v. Venkatasami Naicken.

Wallis, C. J.

The Chief Justice: I agree with the conclusion. I think a reference of a suit to the presiding Judge must be held to be altogether *extra cursum curiae*, and not the less so when two others are joined with him, and that the decree passed in accordance with their decision must be regarded as a consent decree, and as not subject to the provisions of the second schedule.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ABDUR RAHIM AND MR. JUSTICE NAPIER.

Koyittal Parambil Parkum Chirathodi Vazha Valappil Cheeru and others	...	*Appellants* in both the appeals. (Plaintiffs.)*
v.		
Attimana Illoth Narayanan Nambudiri and others.	...	*Respondents in both the appeals (Defendants 2, 1, 3, 4 and 11th Respt. in the L. A. Court.)*

Trust—Two trustees—Mortgage of trust property by one only—Validity—Other trustee previously consulted but wrongly refusing to join in the act—Effect.

In a case in which there were only two trustees, *held* that the grant of a mortgage of the trust property by one of the trustees only was invalid, even where the trustee granting the mortgage had consulted his co-trustee as to the grant thereof and the latter wrongly refused to join in the act

Savitri Antarajanam v. *Raman Nambudri* 1 referred to.

Koyittal Parambil Parkum v. Attimana Illoth. Narayanan Nambudiri.

Second Appeal against the decree of the District Court of North Malabar in Appeal Suits Nos. 587 and 590 of 1915, preferred against the decree of the Court of the District Munsif of Kuthuparamba in Original Suit No. 232 of 1914.

The Court delivered the following

Judgment:—Before disposing of these appeals, we ought to have a clear finding from the Lower Appellate Court as to whether the 2nd defendant consented to the kanam being granted to the appellants although he did not join in its execution. Both parties will be allowed to adduce fresh evidence on this point. One month will be allowed for the submission of the finding and seven days for objections.

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* S. A. No. 46 and 47 of 1918. 16th December 1918.

1. (1900) I. L. R. 24 M. 296.

Koyittal Parambil Parkum. v. Attimana Illoth Narayanan Nambudiri.

[In compliance with the above order the Subordinate Judge submitted "that defendant 2 never consented to the particular kanam in question being granted to the plaintiff's assignor and at the time when the kanam deed was executed was not consenting to any kanam being granted to appellant's assignor."]

K. P. M. Menon and *E. Ramaswami Aiyar*, for Appellant.

C. Madhavan Nair, for Respondent.

The Court delivered the following

Judgment :—The learned District Judge has found that one of the co-uralas did not give his consent to the grant of the kanam in question. But it is argued that neverthless the act of one trustee, if he has consulted the other trustee as to the grant of a mortgage or any similar transaction and that trustee wrongly refused to join in the act, was valid. There is no express authority dealing with the case of two trustees, though there are a number of cases in which it has been held that where there are a number of trustees the act of the majority will be binding and valid if they had given a proper opportunity to the other trustees to consider the advisability of the act in question. But those decisions are based on the principle that unless the act of the majority was upheld in many cases the trust estate would suffer. In the case of two trustees however this principle will not apply because there is no majority. That is what is practically indicated in *Savitri Antarajanam* v. *Raman Nambudri* [1] The decision in *Wilkinson* v. *Malin*[2] which is the leading case on the subject bases it on the principle that the majority should have approved of the act. We do not think that we should be warranted in extending the principle to a case like the present where only one out of two trustees has exercised an act which ought to be done by both the trustees jointly.

But it is pointed out that the suit ought not to have been dismissed altogether and that the plaintiffs should have a charge for the amount actually advanced by him as it went to discharge a liability on some of the trust properties including the property in the suit. We think there is force in this contention and we therefore modify the decree of the lower court by declaring a charge on the property in suit for the amount of Rs. 418-14-0. The appellant will bear the costs of this appeal.

A. S. V.

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1. (1900) I. L. R. 24 M. 269. 1 ( ) 2 C. and J. 63.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH.]

PRESENT :—SIR JOHN WALLIS, CHIEF JUSTICE, MR. JUSTICE OLDFIELD AND MR. JUSTICE SESHAGIRI AIYAR.

Vaitheeswara Iyer ... *Appellant** (*Plaintiff*)

v.

Srinivasa Raghava Iyengar and another. ... *Respondents* (*Defendants* 1 *to* 5 *and* 6*th Respondent in the District Court*).

F. B.

Vaitheeswara Iyer *v.* Srinivasa Raghava Iyengar.

Mortgage—Benamidar assignee—Right to sue on mortgage.

An assignee mortgagee can sue upon the mortgage, even though he is a mere benamidar.

Chowdhuri Gur Narain Singh v. *Sheo Lal Singh* [1] followed.

Second Appeal against the decree of the District Court of Trichinopoly in Appeal Suit No. 168 of 1916 preferred against the decree of the Court of the Subordinate Judge of Trichinopoly in Original Suit No. 113 of 1914.

The Court (Phillips and Napier, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

This is a suit on a mortgage by an assignee mortgagee. The Lower Appellate Court has found that the plaintiff was a benamidar for defence 1st witness and has dismissed the suit obviously on the ground that a benamidar cannot sue on title. Before us it is urged on the authority of *Singa Pillay* v. *Govinda Reddy*, [2] that such a benamidar can sue. The case relied on is a direct authority for that contention. We are however unable to accept it as conclusive. In this Court ever since the decision in *Kuthaperumal Rajali* v. *The Secretary of State for India*, [3] it has we think been consistently held that a benamidar must show some right to sue under the general law apart from the fact that he lent his name for the purchase. At least we are aware of no decision to the contrary and no such case has been relied on by the learned Judges who decided *Singa Pillay* v. *Govinda Reddy*. [2] With deference to the learned Judges, we should be prepared to consider the matter concluded by the doctrine of *stare decisis* but for the fact that the latter decision is published in the authorized Law Reports. But that being the case we think that the question must be referred to a Full Bench. We do not think it necessary ourselves to examine the cases in other Courts as was done in *Kuthaperumal Rajali* v. *The*

* S. A. No. 1816 of 1917. 4th February, 1919.

1. (1918) 36 M. L. J. 68 P. C. 2. (1917) I. L. R. 41 Mad. 435.
3. (1906) I. L. R. 30 Mad. 245.

F. B.

Vaitheeswara Iyer *v.* Srinivasa Raghava Iyengar.

Secretary of State for India [1] and has been done in *Singa Pillay* v. *Govinda Reddy*, [2] but we would offer a few observations on the latter case. With deference to Spencer, J., we do not think that the unreported case, Second Appeal 186 of 1903, was quoted with approval in *Kuthaperumal Rajali* v. *The Secretary of State for India.* [1] On the language of the learned Judges we gather that they did not approve of it and sought to distinguish it on the ground that the plaintiff in that case may have been appointed an agent. In the present case such a contention could not be raised as both the plaintiff and the defence 1st witness have sought to make out that plaintiff was the real purchaser and the plaintiff was admittelly not an agent. Seshagiri Aiyar, J., relies on *Sri Raja Datla Venkata Surya Narayana Jagapathi Raja* v. *Goluguri Bapiraju* [3] as an inroad on the rights of the real owner. With deference we do not think that it is. The plaintiff in that case was a successful bidder at a Court auction of certain property and a sale certificate was issued to him. He subsequently sued to have the sale cancelled on the ground of a fraudulent suppression of facts at the auction. The plaintiff was found to be a benamidar. The learned Judges following *Kuthaperumal Rajali* v. *The Secretary of State for India* [1] among other cases enunciated the proposition on page 148 that a benami transaction does not vest any title to an immoveable property, but they continue and say that that does not prevent a person why has been found to be an agent for an undisclosed principal in a contract for purchase of land from suing for any relief *in respect of the contract* even though the land has subsequently been conveyed to him. In our opinion this decision does not even go so far as the reservation in *Kuthaperumal Rajali* v. *The Secretary of State for India* [1] for in the latter case the right of an agent for an undisclosed principal to bring any suit appears to be conceded. We think that the decision in *Singa Pillai* v. *Govinda Reddy* [2] does distinctly negative the principle laid down in *Kuthaperumal Rajali* v. *The Secretary of State for India* [1] and accepted in *Sri Raja Datla Venkata Surya Narayana Jagapathi Raju* v. *Goluguri Bapiraju.* [3] It is necessary therefore to refer to a Full Bench the following question :

"When on the evidence it is found that an assignee mortgagee [1] is a mere benamidar, can he sue on the mortgage ?"

A. Krishnaswami Aiyar and *S. Subramania Aiyar*, for Appellant.

N. Rajagopalachariar for 1st Respondent.

K. V. Venkatasubramania Aiyar for *S. T. Srinivasa Gopalachari* for 4th Respondent.

R. Srinivasa Aiyangar, for the 6th Respondent.

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1. (1906) I. L. R. 30 Mad 245=17 M. L J. 174.
2. (1917) I. L. R. 41 Mad. 435, 3. (1910) I. L. R. 34 Mad. 148.

F. B.

Vaitheeswara Iyer v. Srinivasa Raghava Iyengar.

The Court expressed the following

Opinion.—We think that this question must be considered to have been settled by the recent pronouncement of the Privy Council in *Choudhri Gur Narayan* v. *Sheo Lal Singh*.[1] The respondents were not represented, but the report of the argument shows that the divergent decisions of the Courts in India were placed before their Lordships by Mr. De Gruyther who appeared for the appellants. Mr. Amir Ali dealt with the point in the following very general terms. "As already observed, the benamidar has no beneficial interest in the property or business that stands in his name ; he represents, in fact, the real owner, and, so far as their relative legal position is concerned he is a mere trustee for him. Their Lordships find it difficult to understand why, in such circumstances, an action cannot be maintained in the name of the benamidar in respect of the property although the beneficial owner is no party to it." These very general observations appear to us to be conclusive of the question referred to us, and we accordingly answer it in the affirmative.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SADASIVA AIYAR AND MR. JUSTICE NAPIER.

Nalluri Chenchiah and others ... *Petitioners* * (*Accused*).

Nalluri Chenchiah *In re.*

Penal Code, S. 193—Perjury—Evidence given in Civil Court—Deposition not read over or interpreted to witness—Effect of—Criminal Procedure Code, Ss. 239, 435 and 436—Joint preliminary enquiry by magistrate, legality of—Sessions Judge directing case to be committed to Sessions, when offence not exclusively triable by his Court—Order illegal.

It is dangerous and against public policy to convict a person for perjury on the strength of his deposition in a Civil Court when that deposition has not been interpreted and read over to him as required by O 18, Rr. 5 and 6 of the Code of Civil Procedure.

Bogra v. *Emperor*[2] referred to. *Meango* v. *Baviah*[3] not followed.

It is not competent to a Sessions Judge acting under Ss. 435 and 436 of the Criminal Procedure Code to direct a case to be committed to his court when the offence is one which is not exclusively triable by the court of Sessions.

S. 239 of the Criminal Procedure Code prohibits only a joint trial and not a joint preliminary enquiry into a case for the purpose of committal to the Sessions.

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* Crl. R. C. No. 583 of 1918. 16th January 1919.

(Crl. R. P. No. 471 of 1918.)

1 (1918) 36 M. L. J. 68. 2. (1910) I. L. R. 34 M. 111=20 M. L. J. 943.

3. (1917) 45 I. C. 507.

Nalluri Chenchiah *In re.*

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of Sessions of the Guntur Division dated 15th July 1918 in Cr. R. P. No. 10 of 1918 preferred against the order of discharge of the court of the Stationary 2nd class Magistrate of Ongole in P. R. Case No. 4 of 1918.

P. Chenchiah for the petitioners.

Public Prosecutor for the Crown.

The Court made the following

Sadasiva Aiyar, J.

Order :—*Sadasiva Aiyar, J.*—The petitioners in revision are the four accused in P. R. Case No. 4 of 1918 on the file of the Stationary 2nd Class Magistrate, Ongole. An enquiry for the purpose of commitment or discharge as the case may be, was made in this case by the said Stationary 2nd Class Magistrate, the complaint against the 1st accused being under two Ss. 471 and 193, I. P. C., and against the other accused under S. 193, I. P. C. alone. The charge under S. 193 relates to the depositions Exs. K. L. M. and N. given by the four accused before the District Munsif of Ongole in O. S. No. 47 of 1912 to the effect that the complainant executed a promissory note for Rs. 500 in favour of the 1st accused's father. The Stationary Sub-Magistrate discharged all the accused under S. 209, Criminal Procedure Code. He considered that Exs. K. L. M and N were not admissible in evidence as the legally correct record of the statements given by the accused in the Ongole District Munsif's Court's suit, because it appeared from the evidence of the trial clerk, (P. W. 3) of the District Munsif's Court that the depositions after they were completed were not interpreted and read over to the witnesses as required by O. 18, Rr. 5 and 6 of the Civil Procedure Code. He also held that the statements could not be proved by any other evidence except these records (Exs. K, L. M and N) under S. 91 of the Indian Evidence Act. This is the ground on which the Stationary Sub-Magistrate based the discharge of the accused so far as the offence under S. 193, I. P. C., was concerned. As regards the offence under S. 471, I. P. C., against the 1st accused alone, the Magistrate's reasons are not quite clear except that the depositions. Exs. K. L. M and N cannot be used to connect the 1st accused with the forged document Ex. A.

Nalluri Chenchiah In re

Sadasiva Aiyar, J.

Against the order of discharge a petition under Ss. 435 and 437 of the Code of Criminal Procedure seems to have been presented to the Sessions Judge and the learned Judge set aside the order of discharge and passed an order containing two directions the first being that the case against the 1st accused should be committed to the Sessions Court by the Sub-Magistrate in order that the 1st accused may be tried for the offences under Ss. 471 and 193, I. P. C., and the 2nd direction being that as regards the accused 2, 3 and 4 the District Magistrate of Guntur should direct either the Joint Magistrate of Ongole or any other Magistrate, he thinks fit, to make a further enquiry into the complaints against these persons and try them as separate cases and dispose of them according to law. I must say that the learned Sessions Judge's first direction out of the two directions found in his order is not warranted by the powers exercisable by him under the provisions of S. 435 or S. 436 of the Criminal Procedure Code. The offence under S. 193, I. P. C., is not exclusively triable by the Court of Sessions. The offence under S. 471, I. P. C., is also not exclusively triable by the Court of Sessions unless the forged document is a promissory note of the Government of India. The Criminal Procedure Code (S. 435) gives the Sessions Judge power only to call for and examine records. S. 436 gives him power to order commitment only when the offence is exclusively triable by the Sessions Court. The Sessions Judge's order therefore directing the 1st accused to be committed to his court is illegal and must be set aside. As regards the charge under S. 193, I. P. C., against all the accused, there is a case not officially reported but mentioned in *Meango* v. *Baviah* [1] which goes to the length of holding that even serious irregularities in making the record of the depositions of witnesses do not render that record inadmissible in evidence to prove the statement so recorded and only go in mitigation of the weight to be attached to that record as accurate. I am not prepared to agree to that extent. Where a deposition *after it has been completed* has been interpreted and read over to a witness and acknowledged by him to be correct, any irregularity due to the omission of the observances of further formalities such as the presence of the Judge and his listening to the reading during the time when the deposition is interpreted and

1. (1917) 45 I. C. 507.

Nalluri Chenchiah In re.

Sadasiva Aiyar, J.

read over to the witness may not affect the admissibility of the record as evidence of the witness's statement. See *Bogra* v. *Emperor* [1]. But the omission to interpret and read over the deposition to the witness *after the deposition is completed* cannot in my opinion be put on the same footing, because the guarantee provided by the law for the accuracy of the deposition has been substantially ignored ; and it is dangerous and against public policy to make a witness liable on such a wholly unsafe record. I would therefore set aside the Sessions Judge's order so far as it directs the District Magistrate to make further enquiry in respect of the charge under S. 193, I. P. C.

I may add that the Sessions Judge fell into another error in holding that the Sub-Magistrate contravened the provisions of S. 239 of the Criminal Procedure Code in enquiring into the cases of these four accused jointly—S. 239 prohibiting only a joint trial and not a joint preliminary enquiry into a case for the purpose of commitment to the Sessions. Though the Sessions Judge's order as against the 1st accused must be set aside as illegal, I think that this is a case in which the powers of this court under S. 439, Cr. P. C., might properly be utilised in passing the necessary order in connection with the alleged forgery of the promissory note for Rs. 500 in the interests of justice. There was some evidence before the Sub-Magistrate that the 1st accused did use the document as genuine in a Court of Justice and that the document is a forgery. The proper course for the Sub-Magistrate under those circumstances was to have committed the 1st accused to the Sessions Court as regards the offence under S. 471. I would therefore direct him to do so.

Napier, J.

Napier, J:—I agree. I would add that I am strongly influenced in the view I take as to the admissibility of the Exs. K, L, M and N which have clearly been recorded in an irregular manner, by the provisions of S. 91 of the Evidence Act which seem to lay down that the deposition is the only evidence admissible of the statements alleged to have been made by the witness. The words are "in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of such matter except the document itself or secondary evidence of it. It seems to me that where the legislature has imposed so narrow limits on

1. (1910) I. L. R. 34 M. 141.

Nalluri Chenchiah *In re.*

Napier, J.

methods of proof we should be careful to see that this sole proof is forthcoming in a form which is free from suspicion and I entirely agree with my learned brother that where the ground of the attack goes to the knowledge of the witness as to what has been recorded as his statement, we have not got that certainty of accuracy which the law must require under S. 91 of the Evidence Act. I agree with the order proposed by my learned brother.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SADASIVA AIYAR AND MR. JUSTICE SPENCER.

Dhulipalla Butchayya ... *Appellant* Plaintiff.*

v.

Kuppa Venkatakrishnayya and others ... *Respondents (Defendants 1, 3 & 4)*

Dhulipalla Butchayya *v.* Kuppa Venkatakrishnayya.

Hindu Law—Father's debts—Binding nature on sons—Proof of immorality by the sons—Whether satisfied by showing father had no trade or business and his income was sufficient and that he was leading an immoral life—Appropriation of payments—Whether creditor entitled to appropriate payments without specific direction—Interest up to date and balance for portion of the principal.

When a Hindu son seeks to escape liability for the debts contracted by his father on the ground that they were contracted for immorality, he ought to show by reasonable proof that there is a connection between the debts and the immoral purpose.

The immoral character of the debts is not proved by showing that the father was leading an immoral life that the income of the family was sufficient for the family needs and that there was no trade or business necessitating the borrowing of loans. *Ram Nath* v. *Balaji Ram* [1] not followed,

A creditor is entitled to appropriate the various payments by the debtor made without specific directions in full satisfaction of the interest due till the respective dates of payment and the balance in discharge of the principal *pro tanto.*

Second appeal against the decree of the Court of the Additional Temporary Subordinate Judge of Guntur in A.S. No. 60 of 1916, preferred against the decree of the Court of the Additional District Munsif of Tenali in O. S. No. 18 of 1915.

V. Ramesam for the Appellant.

P. Narayanamurthi and *G. Krishna Arya* for Respondents.

The court delivered the following

Sadasiva Aiyar, J.

Judgments :—*Sadasiva Aiyar, J.*—There are two questions raised in this second appeal filed by the plaintiff, the respondents

* S. A. No. 1848 of 1917. 23rd October 1918.

1. (1912) 17 I. C. 735.

Dhulipalla Butchayya v. Kuppa Venkata-krishnayya.

Sadasiva Aiyar, J.

being the 1st defendant and his sons (the defendants 3 and 4). The suit was brought on a promissory note executed by the 1st defendant. The first of the two questions is whether the plaintiff has a right to appropriate several payments made by 1st defendant (without specific directions) in full satisfaction of the interest due to the plaintiff on the pro-note till the respective dates of payment and the balance as far as would go towards the principal amount or whether plaintiff ought to treat whatever was paid as paid, wholly towards the principal and allow counter interest on the whole of the amount of each payment without deducting therefrom the interest due till the date thereof. I think the Lower Courts were wrong in deciding in favour of the second alternative. The cases in *Lachmeswar Singh Bahadur* v. *Syad Lutf Ali Shah* [1], *Bamundas Mookerjee* v. *Omeish Chunder* [2], *Kripasindhu Sahu* v. *Raja of Kallikotta* [3] and S. A. No. 143 of 1916 (the two latter being decisions of this court), clearly lay down the rule in support of the 1st alternative. I would therefore decide this question in favour of the appellant. The decisions of the Lower Courts will be modified by calculating the amount due in accordance with the above observations.

The second question is whether on the facts found by the Lower Courts, they were justified in finding that the defendants 3 and 4 had discharged the burden of proving that the money borrowed under Ex. B was spent for illegal or immoral purposes. The lower appellate court says : " In this case, I must say that defendants 3 and 4 have not succeeded in proving which specific part of the consideration for Ex. B was spent for immoral purposes." I think that this means that no portion of the consideration has been directly connected by the evidence with any expenditure for immoral purposes. Notwithstanding this observation, the ultimate conclusion of the lower appellate court is that because the 1st defendant's " life " was " wild and immoral," because he was not engaged in any trade or business and because his lands yielded sufficient income, the defendants 3 and 4 have discharged the burden of proving that the money borrowed under Ex. B was spent on immoral purposes. I think that this is opposed to the decision of the

1. (1871) 8 Beng. L. R. 110 2. (1856) 6 M. I. A. 289.
3. (1915) 29 I. C. 718.

Dhulipalla Butchayya v. Kuppa Venkatakrishnayya.

Sadasiva Aiyar, J.

Privy Council in *Sri Narain* v. *Lala Raghubans Rai* [1], in an Allahabad case, the High Court of Allahabad having long held the same view (See *Hanuman Singh* v. *Nanak Chand* [2], *Kishan Lal* v. *Gurudhwaja Prasad Singh* [3] and *Babu Singh* v. *Bihari Lal* [4]; see also *Sadasiv Dinkar Joshi* v. *Dinkar Narayan Joshi* [5], *Chintamanrav Mehendale* v. *Kashinath* [6] and *Hazari Mull Babu* v. *Abaninath Adhurjoya* [7]). The lower appellate court relies on a Punjab Chief Court decision reported in *Ram Nath* v. *Bulaqi Ram* [8] which no doubt supports its view of the law but I am unable to follow it in preference to the decisions of the Privy Council and of this High Court and other High Courts above referred to.

The Lower Courts' decree have therefore to be further modified by making the defendants 3 and 4 liable along with the 1st defendant to the extent of the ancestral family properties the 1st defendant of course, being also personally liable.

Having regard to all the circumstances, I would order that the defendants 3 and 4 do bear their own costs throughout and that the plaintiff do bear his own costs here and in the lower appellate court. The award of costs to the plaintiff in the Munsif's court against the 1st defendant will stand.

Spencer, J.

Spencer, J. :—I think the decision in *Bhakat Mal Sahi* v. *Abdul Karim* [9] correctly sums up the settled law on the subject of the immoral debts, when it lays down that "in some way by reasonable legal proof it must be shown that there is a connection between the debt and the immoral purpose."

In this case that condition does not seem to be satisfied by mere proof that 1st defendant was leading an immoral life coupled with the negative evidence that the income of his estate was sufficient for the family needs and that there was no trade or business necessitating borrowing of loans.

The finding of both the Lower Courts that defendants 3 and 4 had discharged the onus that lay upon them is thus not a finding which can be justified upon the facts which have been found from the evidence to exist.

1. (1913) 25 M. L. J. 27.
2. (1884) I. L. R. 6 A. 193.
3. (1899) I. L. R. 21 A. 238.
4. (1908) I. L. R. 30 A. 156.
5. (1882) I. L. R. 6 B. 520.
6. (1889) I. L. R. 14 B. 320
7. (1912) 17 C. W. N. 280.
8. (1912) 17 I. C. 735.
9. (1916) 1 Pat. L. J. 86

Dhulipalla Butchayya v. Kuppa Venkatakrishnayya.

Spencer, J.

Although I am reluctant to interfere with what is on its face a finding of fact, especially where the lower courts have had in their minds the principles governing the question to be decided I think that they have gone too far in holding that the onus was discharged when the materials before them do not establish any direct connection, between the suit debt and the 1st defendant's immorality and there is nothing more tangible than a mere surmise to connect the debt with the immorality. Defendants 3 and 4 should have proved that at least some part of the consideration for Ex. B was spent for immoral purposes. The case in *Ram Nath* v. *Bulaqi Ram* [1] followed by the Subordinate Judge itself enunciates the principle that there must be clear connection between the immoral life and the debts contracted though in applying that principle the learned Judges have considerably widened it by assuming that every debt contracted at a time when the debtor was living a riotous life must necessarily have been devoted to immoral purposes.

I therefore agree with my learned brother in allowing the second appeal on this point and upon the question of interest also, as to which I have nothing to add to what he has said.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SESHAGIRI AIYAR AND MR. JUSTICE PHILLIPS.

N. Sethuramaswami Nayani Varu ... *Appellant** (*Petitioner Judgment-debtor*).

v.

Sowcar Syed Mir Hussain Sahib and another, *Respondent* (*Decree-holders and Auction-purchasers*).

Sethuramaswami Nayani Varu v Syed Mir Hussain Sahib.

Civil Procedure Code O. 21, R. 89—Application by judgment-debtor who had executed a private sale-deed of the properties—Sale-deed not registered—Right of judgment-debtor if affected by the execution of a registered conveyance subsequently to application.

A judgment-debtor whose property had been sold in court-auction, conveyed it by a private sale to a third person and then applied under O. 21, R. 89 of the C. P. Code, to set aside the sale. On the date of the application the sale deed had not been registered though the time for its registration had not expired. Subsequent to the application, the judgment-debtor executed another conveyance of the

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* C. M. A. No. 55 of 1918. 6th December 1918

1 (1912) 17 I. C. 735.

Sethuramaswami Nayani Varu v. Syed Mir Hussain Sahib.

property to the same third person and got it registered. The Court below rejected the application of the judgment debtor on the ground that he had no interest in the property on the date of the application, by reason of his having executed a conveyance which could be registered at the option of the vendee on the date of the application.

Held, reversing the decision of the Court below, that notwithstanding the execution of the prior unregistered conveyance, the judgment debtor continued to be the owner of the properties so as to entitle him to apply under O. 21, R. 89 of the C. P. Code and that the execution of a subsequent registered conveyance would not deprive the judgment-debtor of a relief to which he was entitled on the date of the application.

Subbarayudu v. *Lakshminarasamma* [1], *Ishar Das* v. *Asaf Ali Khan* [2], distinguished.

Kurri Veerareddi v. *Kurri Bapi Reddi* [3], *Ramanathan* v. *Ranganathan* [4] rel. on.

Appeal against the order of the Court of the Subordinate Judge of North Arcot dated 11th January 1918. C. M. P. No. 293 of 1917 in O. S. No. 29 of 1912.

T. Narasimha Aiyangar and *N. S. Rangasami Aiyangar*, for Appellant.

T. R. Venkatarama Sastri and *B. C. Seshachala Aiyar*, for Respondents.

The Court delivered the following

Judgment :—This is an appeal against the order of the Subordinate Judge of Chittoor rejecting an application by the judgment-debtor under O. XXI, R. 89 of the Code of Civil Procedure (Act V of 1908). The facts are these : The properties of the judgment-debtor were sold in court-auction on the 16th of April 1917. On the 22nd of June 1917 the judgment-debtor executed a sale-deed to a third party. On the 25th of June, he applied to the Court to set aside the sale and deposited the requisite amount. The conveyance of the 22nd of June was not registered. A fresh sale-deed was executed to the same third party on the 20th of August 1917. The Subordinate Judge disposed of the application on the 11th of January 1918. He held that as the conveyance of the 22nd of June was capable of being registered and as when registered, it would confer title as on the date of the sale, the judgment-debtor had no *locus standi* on the 25th of June to present the application. He has relied upon *Subbarayadu* v. *Lakshminarasamma* [1] and *Ishar Das* v. *Asaf Ali Kan* [2]. In those cases there was a completed registered

1. (1913) I. L. R. 38 M. 775.
2. (1911) I. L. R. 34 A. 186.
3. (1906) I. L. R. 29 M. 336.
4. (1917) I. L. R. 40 M. 1134.

Sethuramaswami Nayani Varu v. Syed Mir Hussain Sahib

conveyance and it was held that by virtue of those conveyances the judgment-debtor was divested of his right to present an application under O. XXI, R. 89 of the Code of Civil Procedure (Act V of 1908). Other High Courts have taken a different view. They have held that the judgment-debtor would always have the right of getting the sale set aside and that the execution of a conveyance to a third party would not interfere with his right. It is not necessary in the view we are taking of the case, to express any opinion on this vexed question. In our opinion the judgment-debtor was a person "owning the property" on the date of his application. The fact that the sale could have been perfected and was capable of passing a complete title should not affect his *locus standi*. It was held in this court by a Full Bench in *Kurri Veerareddi* v. *Kurri Bapi Reddi* [1] that notwithstanding the execution of an unregistered conveyance and the passing of possession thereunder, the vendor of the property was entitled to sue for possession against the vendee. That view has been confirmed in *Ramanathan* v. *Ranganathan* [2]. Consequently the mere execution of a conveyance does not deprive the owner of his rights in the property until registration. The rule of law which dates back the title when registered, to the date of the conveyance does not affect this principle. The right is in the vendor, although it can be divested by the registration of the conveyance.

The decisions to which the learned Vakil for the respondent drew our attention, namely, *Savitri Ammal* v. *Ramaswami* [3] and *Venkata Reddi* v. *Yellappa Chetty* [4] do not affect the present case. The Subordinate Judge says that the conduct of the judgment-debtor and of his vendee was fraudulent. We fail to understand this. On the facts the utmost that can be said is, that the vendor and the vendee realising that if the document of the 22nd of June was registered it might affect the application of the judgment-debtor, agreed not to get it registered and made up their mind that a new sale-deed should be executed. There is nothing illegal or wrong in such a procedure. The judgment-debtor had the right under O. XXI, R. 89 to enforce his rights. His vendee who was anxious to get a valid sale, agreed, in his own interest, not to press for the registration of the earlier

1. (1904) I. L. R. 29 M. 336.
2. (1917) I. L. R. 40 M. 1134
3. (1898) 8 M. L. J. 266.
4. (1916) 5 L. W. 234.

Sethuramaswami Nayani Varu v. Syed Mir Hussain Sahib.

document. Such an attitude is quite reasonable and has no element of fraud in it. We are therefore of opinion that the judgment-debtor has a right to make the application on the date he made it. It was next argued, relying mainly upon *Karalia Nanubhai* v. *Mansukhram* [1] that as a new sale-deed was executed before the final order was passed, the judgment-debtor had lost his right. We are unable to accept this contention. The new conveyance was executed *pendente lite* and the vendee would be affected by all the equities enforceable against his vender. It is a well-recognised rule of law that the rights of the parties should be considered as on the date of suit or application and not with reference to what transpired subsequently. It is true that courts have power under certain circumstances to grant relief to the plaintiff with reference to what has happened since the institution of the suit or application. But that is an indulgence which the court may or may not grant. The ordinary right of the party is that his claim should be adjudicated with reference to the matters that existed on the date of his suit or application. If *Karalia Nanubhai* v. *Mansukhram* [1] is inconsistent with this view, we are respectfully unable to accept it as good law. We must therefore reverse the order of the Subordinate Judge and set aside the court sale made on the 16th April 1917. Appellant is entitled to his costs here and in the court below against the 2nd respondent.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SESHAGIRI AIYAR AND MR. JUSTICE PHILLIPS.

Muthu Ar. St. Arunachallam Chettiar and others ... *Appellants** (*Plaintiffs*).

v.

St. N. Narayanan Chettiar and others. ... *Respondents.* (*Defendants Nos. 1 to 4*).

Arunachallam Chettiar v. Narayanan Chettiar.

Indian Paper Currency Act, S. 26—Provision—Hundi payable to bearer on demand—Validity of Hundi drawn on a banker—No money with the banker on the date of the hundi—Intended deposit—Whether hundi saved by the proviso to S 26—

* S. A. No. 1819 of 1917. 27th November 1918.

1. (1900) I. L. R. 24 B. 400.

Aruna-challam Chettiar v. Narayanan Chettiar.

Endorsement by the payee of a hundi—Whether endorser estopped from disputing the validity of the hundi—Negotiable Instruments Act, Ss. 120 and 122.

Where a hundi is drawn with the name of the payee as the creditor and the drawer as the debtor entered on the top of the hundi and the language of the hundi is as follows: "the money with Rangoon current rate of interest should be paid on demand to the person who brings this by the Rangoon firm" such a hundi offends against the provisions of Ss. 26 of the Paper Currency Act and a suit is not maintainable on the same

Where such a hundi is drawn on a banker even though the banker has no money of the customer on the date of the hundi if a deposit to meet it is intended, the hundi is saved by the proviso to S. 26.

Per *Seshagiri Aiyar, J., Semble*, the endorser of a negotiable instrument is estopped as against the endorsee from setting up that the instrument is invalid. Ss.120 and 122 of the Negotiable Instruments Act and the English law considered.

Second appeal against the decree of the District Court of Ramnad at Madura in A. S. No. 404 of 1916 preferred against the decree of the court of the Temporary Subordinate Judge of Sivaganga in O. S. No. 16 of 1915.

C. S. Venkatachariar, for Appellants.

A. Krishnaswami Aiyar and *M. Patanjali Sastri*, for Respondents.

The Court delivered the following

Seshagiri Aiyar, J.

Judgments :—*Seshagiri Aiyar J.* :—This is a suit by an endorsee of a hundi. On the 9th of April 1914, the 1st defendant drew the hundi—Ex.A—on a Rangoon firm. At the top of the hundi, the 3rd defendant is described as the creditor and the 1st defendant as the debtor. The exact rendering of the hundi omitting unnecessary portions is : " the money with Rangoon current rate of interest should be paid on demand to the person who brings this, by the Rangoon firm." This was signed by the 1st defendant. Subsequently the 3rd defendant put his signature by way of endorsement. Plaintiffs lent to the 1st defendant on the strength of the endorsement. Hence the suit. The defence was that the debt was discharged, and that as the hundi offended against the provisions of the Paper Currency Act the suit is not maintainable. The court below held that the hundi was not discharged. They came to the conclusion relying upon *Chidambaram Chettiar* v. *Aiyasami Thevan* [1] that the suit should be dismissed.

Mr. Venkatachariar in the second appeal tried to distinguish *Chidambaram Chettiar* v. *Aiyasami Thevan* [1] from the present

1. (1916) I. L. R. 40 M. 585.

Aruna-challam Chettiar v. Narayanan Chettiar.

Seshagiri Aiyar, J.

case on the ground that the hundi must be regarded as not being made payable to the payee or bearer. I am unable to agree with him. The fact that the name of the payee is entered at the top of the hundi does not matter. In effect the hundi is drawn in favour of the 3rd defendant, and is made payable to bearer. I think that even without the endorsement of the 3rd defendant the hundi could have been presented for payment. Consequently it is obnoxious to S. 26 of the Paper Currency Act.

This case, however, is distinguishable from *Chidambaram Chettiar* v. *Aiyasami Thevan*[1] on another ground. In the first place, I think that the document in question is covered by the proviso to the section. Under it, a draft can be made payable "to bearer on demand in respect of deposits of money in the hands of bankers and held at the credit and disposal of persons drawing such drafts." Mr. Patanjali Sastri contended that in the present instance the hundi should not be regarded as being drawn against a deposit of money because on the date of the hundi there was no money in the Rangoon firm due to the 1st defendant. If we turn to the admissions of the 1st defendant contained in his deposition it is clear that this contention must be overruled. He says: "When the hundi was drawn on it I had no money in that firm but I had written to Saigon where I had money to send it on to the said Rangoon firm, and so I drew the hundi on it." * * * "My account with that firm as regards that money is not yet closed. No money is due to me from that firm. The money I wanted to be sent to the Rangoon firm from Saigon was not sent. *After the suit hundi my money has gone to that firm and I have drawn it.*" Notwithstanding the evident intention of the 1st defendant to tell as many lies as would save him from liability the net import of this evidence is that he drew the hundi on money which he directed to be sent to the Rangoon firm and that after drawing the hundi and before presentation for payment at Rangoon, he drew that money out. It is clear from this statement that the case comes within the proviso, because the draft was drawn in respect of an intended deposit of money which was expected to be held by the bankers at the credit and disposal of the 1st defendant. The money that apparently reached Rangoon firm would, but for the dishonest conduct of the 1st

1. (1916) I. L. R. 40 Mad 585.

Arunachallam Chettiar v. Narayanan Chettiar

Seshagiri Aiyar, J.

defendant have been available to the plaintiffs. To hold otherwise would be to decide that wheh a customer draws a cheque or hundi on a bank to which he has directed a payment to be made which would cover the draft is guilty of an offence. The object of the proviso is to enable *bona fide* customers to operate on actual or intended deposits. There is nothing against public policy in so doing and I am of opinion that the hundi was validly drawn on the bank. The subsequent misconduct of the 1st defendant in drawing out the money would not invalidate it.

There is another possible ground. It was not disputed that the plaintiff was a holder in due course. He had paid consideration for the hundi before it had become payable, and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title. *Prima facie* therefore the 3rd defendant is estopped from saying that the hundi which he endorsed is not a valid document. Under the English Bills of Exchange Act the position of the plaintiffs would have been unassailable. S. 55, cl 2 (c) runs thus : "The endorser of a bill by endorsing it, is precluded from denying to his immediate or subsequent endorsee that the bill was at the time of his endorsement a valid and subsisting bill and that he had then a good title thereto." This rule is an illustration of the principle of estoppel contained in S. 115 of the Indian Evidence Act. The Indian enactment though passed a year previous to the passing of the English Bills of Exchange Act, was apparently modelled onits provisions. In the chapter headed Special Rules of Evidence. Ss. 120 and 122 refer respectively to estoppel against makers and endorsers. S.120 says that "the maker or drawer of a Bill of Exchange shall not be permitted in a suit thereon by a holder in due course, to deny the *validity* of the instrument as originally made or drawn." This would undoubtedly make the 1st defendant liable. As regards the endorser: S. 122 says. "No indorser of a negotiable instrument shall, in a suit thereon by a subsequent holder, be permitted to deny the signature or capacity to contract of any prior party to the instrument." There are two noticeable differences between the two sections. One is that under the latter section the liability is incurred not only to the holder in due course but to any holder. In the second

Arunachalam Chettiar v. Narayanan Chettiar.

Seshagiri Aiyar, J.

place, the estoppel is only against *denying the signature or capacity of* the prior party, and not against the *validity* of the instrument as originally made or drawn. There is no reason why there should be this distinction between the position of a drawer of a Bill of Exchange or the maker of a promissory note and the endorser. The English law does not recognise such a distinction, and I am inclined to think that it is a case of inadvertent omission rather than of deliberate departure from the English rule. If we turn to S. 36 of the Act we find that "every prior party to a negotiable instrument is liable thereon to a holder in due course until the instrument is duly satisfied." S. 38 says: "Each prior party is, in the absence of a contract to the contrary, liable thereon as a principal debtor in respect of each subsequent party." The illustration to the section shows that the drawer will be the principal debtor and endorser will be the surety. Ordinarily an estoppel which would apply against the principal party would also be available against the surety unless there are circumstances such as those mentioned in S. 40, etc. Byles in his book on Bills of Exchange (16th Edn.) says at page 180 "The endorser makes a similar contract, and promises in the same way to compensate the holder or any subsequent endorser; he is estopped from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous endorsements; is estopped from denying to his immediate and any subsequent endorsee, that the bill was at the time of his endorsement, *a valid and subsisting bill*, and that he had a good title thereto." I fail to see why this salutary principle of estoppel should not be applied in India. However, having regard to the language of S. 122, I shall not base my decision on the rule of estoppel enunciated in S. 55 (2) (c) of the English Act. The legislature should make this point clear. As I have held that the hundi is covered by the proviso to S. 26 of the Paper Currency Act, this appeal should be allowed and the decrees of the courts below reversed; plaintiff is entitled to a decree as prayed for and to costs in all the courts.

Phillips, J.

Phillips, J:—I agree that the suit document comes within the proviso to S. 26 of the Paper Currency Act. The finding that 1st defendant had no money with his bankers at the time he signed the hundi is not by itself sufficient to show

Arunachalam Chettiar v. Narayanan Chettiar.

Phillips, J.

that he was not operating on money deposited by him with his bankers. In fact he admits that he was so operating and had given instructions for a remittance to be made to his bankers to meet the suit hundi. The Subordinate Judge's conclusion from the mere fact that no money was actually in the banker's hands when the hundi was signed is not warranted, for it would involve the proposition that a cheque drawn payable to bearer at a time when as a matter of fact the drawer had no balance at the bank is an offence against the Paper Currency Act, although the drawer believed he had sufficient funds in the bank or intended to put the bank in funds before the cheque, could be presented. The words of the proviso to S. 26 "in respect of deposits of money in the hands of the bankers" do not seem to me to warrant such a broad proposition. I therefore agree in the order proposed, and think it unnecessary to discuss the further question of estoppel.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR JOHN WALLIS, CHIEF JUSTICE AND MR. JUSTICE SESHAGIRI AIYAR.

A N. A. Ramachandra Rao ... *Appellant** (*1st Defendant*).

v.

T. B. Ramachandra Rao and others ... *Respondents* (*Plaintiffs and Defendants Nos. 2 to 5*).

Ramachandra Rao v. Ramachandra Rao.

Hindu Law—Gift to females—Rule of construction—Settlement in favour of adopted son and wife of settlor—Absence of words empowering alieration by donee—Nature of estate taken by donee—Right of wife to dispose of properties by will.

Where a husband gives property to his wife and the words of the gift are sufficiently clear there is no presumption that the donee takes only a limited estate. *Surajmani* v. *Rabi Nath Ojha* [1] relied on.

The rule laid down by the Privy Council in *Mahomed Shamsool Huda* v. *Shewakram* [2] is a rule of construction to be applied only when there is some uncertainty or ambiguity in the language of the instrument of gift.

A Hindu, on adopting a son, executed a settlement of his properties by which he provided for the payment of certain moneys and allowances in favour of his relations and made a gift (inam) of the remainder of his properties, half to the adopted son and a fourth to each of his two wives. The material portion of the settlement deed was as follows,—"Of the remaining property the adopted boy is to be entitled to and enjoy one-half. Of the remaining half these two persons, my senior wife S. K. and my junior wife S T. shall each take a half." *Held*, on a construction of the document, that each of the wives of the settlor took an absolute estate in the fourth share of the properties given to her by the settlement.

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* A. S. No. 1 of 1918. 8th October 1918.

1. (1907) I. L. R. 30 A. 84. P. C. 2. (1874) L. R. 2 I. A. 7.

Rama-chandra Rao v. Rama-chandra Rao.

It is competent to a widow who acquires property absolutely under a gift or settlement from her husband, to dispose of the same by will.

Bhujanga Rau v. *Ramayamma* [1] *Nannu Meah* v. *Krishnasawami* [2] dissented from.

Surajmani v. *Rabi Nath Ojha* [3] and *Fatehchand* v. *Rup Chand* [4] relied on.

Appeal against the decree of the court of the Additional Temporary Subordinate Judge of Tanjore in O S. No. 23 of 1917 (O. S. No. 35 of 1916 on the file of the Tanjore Sub-Court).

T. R. Ramachandra Aiyar and *T. S. Narayana Aiyar*, for Appellant.

Hon. The Advocate General (*S. Srinivasa Aiyangar*), and *K. Rajah Aiyar* for Respondents.

The Court delivered the following

Wallis, C. J.

Judgments.—*The Chief Justice* :—Construing this very deed in A.S. No. 74 of 1896 Collins, C. J. and Shepherd, J. observed "There being no indication of intention to give a larger estate we must assume that the husband intended that a widow's estate only should pass." The trend of the later decisions in this court beginning with *Sambasiva Aiyar* v. *Venkateswara Aiyar* [5] is against making any such assumption, and they appear to be supported by the judgment of the Judicial Committee in *Surajmani* v. *Rabi Nath Ojha* [3] which cites with approval a ruling of Mitter, J. in *Kollany Kooer* v. *Luchmee Pershad* [6] that there is no presumption that a gift to a widow means a limited gift.

We must, I think, take it to be now settled at any rate so far as this Court is concerned, and until the decisions to which I have referred are overruled by higher authority, that the rule laid down by the Judicial Committee in *Moulvi Mahomed Shumsool Hooda* v. *Shewakram* [7] is a rule of construction to be applied only when there is some uncertainty or ambiguity in the language of the instrument before the Court.

The question then is, is there anything in the terms of Ex. III which warrants the application of the rule. The opening recital is to the effect that the settlor made "the following gifts (inams) of the properties belonging to him on the occasion of his adopting as his son a boy of ten years of age. There is first a gift of chattels and money to a maternal nephew, then directions that certain allowances of paddy should continue to be paid to two

1. (1884) I. L. R. 7 M. 387.
2. (1890) I. L. R 14 M. 274.
3. (1907) I. L. R 30 A. 84
4. (1916) I. L. R. 38 A. 446.
5. (1907) I. L. R. 31 M. 179.
6. (1875) 24 W. R. 395.
7. (1874) L. R. 2 I. A. 7.

Ramachandra Rao v. Ramachandra Rao.

Wallis, C. J.

descendants of his maternal uncles, that six Brahmins should be fed daily from the income of certain lands, aud that a saffron allowance of Rs. 25 should continue to be paid to his sister. Then comes the disposition in favour of the widows. Of the remaining property the adopted boy "is to be entitled to and enjoy one-half." "Of the remaining half these two persons, my senior wife Sowbagiavathi Kamatchi and my junior wife Sowbagiavathi Tulja shall each take a half". On the language of this instrument, I have come to the conclusion that there is no sufficient reason for cutting down the disposition in favour of the widows. *Herabai* v. *Lakshmibai* [1] was decided on the view that there is a general presumption that a gift to a woman is only of a woman's estate, though on the language of that document, which was different from the language here, the rule of construction laid down in *Moulvi Mahomed Shumsool Hooda* v. *Shewakram* [2] may have been applicable as was held, though with a different result in *Seshayya* v. *Narasamma* [3]. Sir Charles Sargent, however, in the course of his judgment spoke of "the extreme improbability that having adopted a son the testator, should have intended to give more than a life-estate, or, at the utmost, a widow's estate to his wife." As I stated at the hearing, my very general impression derived from the cases which have come before me is, that there is no such extreme improbability in this Presidency and my learned brother, whose opinion on such a point is entitled to much greater weight, is of the same opinion. I concur in the order proposed.

Seshagiri Aiyar, J.

Seshagiri Aiyar, J:—I entirely agree. The suit is to recover possession of properties which were last in the enjoyment of one Tulja Boyee. Tulja Boyee's husband Ramojee Bavajee adopted plaintiff's father Bavajee. He executed Ex. III on the 6th of August 1858 by which he settled one-half of his properties upon his adopted son and gave the other half to his two wives. Tulja Boyee, the junior wife took possession of a fourth share under that settlement. The defendant claims under her will.

The points for consideration are whether Tulja Boyee took an absolute estate under Ex. III and whether she was competent to dispose of the property by a will.

1. (1887) I. L. R 11 B 573. 2. (1874) L. R. 2 I A 7.
3. (1899) I. L R. 22 M. 357.

Ramachandra Rao v. Ramachandra Rao.

Seshagiri Aiyar, J.

I shall first deal with a few decisions of the Judicial Committee which were quoted as indicating the principles on which an instrument like the present should be construed. The learned Advocate General relied upon *Moulvi Mahomed Shamsool Hooda* v. *Shewakram* [1] and *Radha Prashad Mullick v. Ranee Mani Dassee* [2]. Mr. Ramachandra Aiyar quoted *Surajmani v. Rabinath Ojha* [3]. In the first two cases the facts were almost identical. In both of them the father gave properties to his daughter or daughters and their children. In both, the Judicial Committee held that the daughter or daughters took only a limited estate, and pointed out that in construing wills of Hindus, their ordinary notions as to the devolution of property may be taken into account. In these cases it was clear that the daughters and their children could not have been regarded as tenants in common, because the children were not mentioned by name and it was as a class that they were referred to. The question therefore was whether the words "and their children" should be regarded as mere surplusage or whether they should be referred to to ascertain the intention of the donor. Their Lordships held that ordinarily a Hindu would desire that his properties should remain in the possession of his descendants, and that consequently the donor could not have intended to give absolute powers of disposition to the daughters. I do not think that these two judgments are authorities for the proposition that in all cases where gifts are made to females, a Hindu must be deemed to have given them only an estate for life. On the other hand the decision in *Surajmani* v. *Rabinath Ojha* [3] relied on for the appellant shows that in the opinion of their Lordships no difference should be made between a male and a female provided the words of gift are sufficiently clear to convey property. They quoted with approval the dictum of Mitter, J in *Kollany Kooer* v. *Luchmee Pershad* [4] wherein the learned Judge stated: "We must hold that gift in question was an absolute gift, unless it can be shown that by the Hindu Law, a gift to a female means a limited gift or carries with it the effect of creating an estate similar to the " widow's estate" under the law of inheritance. I am not aware of any such provision in the Hindu Law nor have we been referred to any authority in support of it". There can be no

1. (1874) L. R. 2 I. A. 7 at 14. 2. (1908) 1, L.R. 35. C. 896 (P.C.)
3. (1907) I. L. R. 30 A. 84 (P C) 4. (1874) 24 W R. 395.

Rama-chandra Rao v. Rama-chandra Rao.

Seshagiri Aiyar, J.

doubt that the Hindu Law does not enunciate that women as donees can only take an estate for life. The Judicial Committee say at the end of page 89 : "Nothing has been found in the context here or the surrounding circumstances or is relied upon by the respondents, but the fact that the donee is a woman and a widow, which was expressly decided in the last mentioned case not to suffice". The case referred to is *Lalit Mohan Singh Roy* v. *Chukkun Lal Roy* [1]. If we remember that Mr. Justice Mitter's decision in *Kollany Kooer* v. *Luchmee Pershad* [2] was given after examining at some length the dictum of the Judicial Committee in *Moulvi Mahomed Shumsool Hooda* v. *Shewakram*[3] it is clear that their Lordships advisedly approved the principle enunciated by Mitter J. In recent years there has been practical unanimity in Madras as to the construction to be placed upon similar documents. The first decision was in *Sambasiva Aiyar* v. *Venkateswara Aiyar* [4] which was contemporaneous with *Surajmani* v. *Rabinath Ojha* [5]. *Venkataraz* v. *Kotayya* [6], *Odai Muthayya* v. *Kavari Kothandaramayya* [7], *Rathna Chetti* v. *Narayanaswami Chetty* [8], *Ramanuja Aiyangar* v. *Sadagopachariar*,[9] and *Namasivayam Pillai* v. *Kuthalingam Pillai* [10], have decided that the sex of the donee is not a ground for cutting down an otherwise full estate.

The learned Advocate General relied upon some decisions of the other High Courts. Most of them were earlier than *Surajmani* v. *Rabinath Ojha* [5], and I do not think it necessary to examine them at any length. I would only say with reference to the observations of Sir Charles Sargent in *Hira Bai* v. *Lakshmi Bai* [11], that at any rate so far as the Southern Presidency is concerned there is nothing improbable in a Hindu giving an absolute estate to his wife when he directs an adoption to be made to him. Cases have not infrequently come before the courts in which in order to avoid possible conflicts between an adopted son and his widow a Hindu has been found to give a portion of his property absolutely to his widow and the other portion to his adopted son.

In deducing a rule of construction, a few considerations should be borne in mind. S. 8 of the Transfer of Property

1. (1897) I. L. R. 24 C. 834.
2. (1875) 24 W. R. 395.
3. (1874) L. R. 2 I. A. 7.
4. (1907) I. L. R. 31 M. 179.
5. (1907) I. L. R. 30 A. 84.
6. (1912) 23 M. L. J. 223.
7. (1914) M. W. N. 387.
8. (1914) 26 M. L. J. 616.
9. (1914) 27 M. L. J. 329.
10. (1917) M. W. N. 78.
11. (1887) I. L. R. 11 B. 573.

Rama-chandra Rao v. Rama-chandra Rao.

Seshagiri Aiyar, J.

Act lays down : "Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is capable of passing in the property or in the legal incidents thereof." Therefore unless there is an expressed or implied qualification to the contrary the donor must be deemed to have conveyed all that he was possessed of in the property granted. The Judicial Committee in the supplemental volume of Indian Appeals at page 47 (*Tagore* v. *Tagore*) recognised this principle. Consequently, if the words employed are clear and unambiguous no matter who the donee is, whether a male or a female, the language of the gift must be given effect to. This is what was laid down in *Surajmani* v. *Rabinath Ojha* [1]. But there may be cases in which it may be necessary owing to the language employed not being clear and precise, or being superfluous to find out the intention of the donor. In such cases, as the learned Advocate-General contended, the personal law of the donee may be taken into account. That is to say, the ordinary rule of inheritance applicable to him or her may be called in aid. This is not a rule of presumption so much as it is one for gathering the intention of the donor. Broadly speaking it may be said that if the language of the instrument is capable of conferring an estate of inheritance, considerations regarding the sex of the donee should be discarded. Where the language is ambiguous, then recourse can be had to ordinary notions of Hindus, as a rule of construction in finding out what the intention of the donor was.

Now I shall turn to Ex. III and see whether in the light of the above discussion the document confers only a life-estate upon Tulja Bhoyee. It was not seriously argued that there is any material difference between the words employed in the case of the adopted son and the words employed in the case of the two wives. Nor was it argued that the words employed in the case of the adopted son were not capable of conveying to him absolute rights in the property. I therefore fail to see why a distinction should be made between the two classes of donations. Further the preamble of the deed says: " I am giving these properties as Inam." The donor was a Mahratta Brahmin who lived in Tanjore and the document was written in Mahratti. Wilson in his Glossary says about the word *Inam* : " In India and

1. (1907) I. L. R. 30 A. 84.

Rama-chandra Rao v. Rama-chandra Rao.

Seshagiri Aiyar, J.

especially in the south and amongst the Mahrattas, the term was especially applied to grants of land rent-free, and in hereditary and perpetual occupation." In another dictionary by a Mahratta scholar the word *Inam* is defined as meaning "a grant in perpetuity without conditions." These definitions support the conclusions at which I have arrived. In my opinion the gift to Tulja Bhoyee was an absolute one. There are certain legacies which have been directed to be paid out of the estate. As they are in terms only for life, the main dispositions are not affected by these life grants.

It was next argued by the learned Advocate-General that even supposing that it was an absolute grant to Tulja Bhoyee she was not competent to dispose of the property by will. He relied upon *Bhujanga Rau* v. *Ramayamma* [1] and *Nannu Meah* v. *Krishnaswami* [2]. At the same time, he frankly admitted that the two decisions are inconsistent with the conclusions of the Judicial Committee in *Surajmani* v. *Rabi Nath Ojha* [3] where one of the widows who had acquired her property under a deed of gift from her husband disposed of it by a testamentary instrument. Their Lordships upheld the will of the Hindu widow. Reference may also be made to *Fatehhand* v. *Rup Chand* [4] where it was held that a widow could dispose by will property which had come to her under a deed of gift. I am unable to find any valid reason for the view that properties in which a Hindu widow has an absolute estate cannot be disposed of by her by a testamentary instrument. These two Madras decisions must be deemed to have been overruled by *Surajmani* v. *Rabinath Ojha* [3] and *Fatehchand* v *Rup Chand* [4]. A portion of the property in suit is governed by the decision of this Court (vide Ex. A). To that extent, the defendants' claim is barred by *res judicata*. The decree of the Subordinate Judge must be reversed and the suit should be dismissed with costs except in respect of the property which was the subject matter of the suit under Ex. A. The memo. of objections is also dismissed with costs.

A. V. V.

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1. (1884) I. L. R. 7 M. 387.
2. (1890) I. L. R. 14 M. 274.
3. (1907) I. L. R. 30 A. 84.
4. (1916) I. L. R. 38 A. 446.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ABDUR RAHIM, MR. JUSTICE OLDFIELD AND MR. JUSTICE COUTTS TROTTER.

Kandasami Pillai and others ... *Appellants** (*Plaintiffs 1, 3 & 4 and 2nd Plaintiff's L. R.*)

v.

Ramasami Mannadi and others ... *Respondents* (*Defendants*).

Kandasaami Pillai. *v.* Ramasami Mannadi.

Lease—Nature of—Suit for possession by lessee—Premium not paid—Right to possession by lessee—Implied covenant—Transfer of Property Act, Ss. 105, 108 (*b*) *and* (*c*)

Under a registered lease deed, the plaintiffs, the lessees claiming thereunder, were to pay off a prior encumbrance (hypothecation) on the land and make some other payments. The plaintiffs did not dischaige the encumbrance. The hypothecatee sued and obtained a decree The lessor-owner thereupon usufructuarily mortgaged the property, and from the money so raised satisfied the decree. The plaintiffs now sued for possession impleading the lessor and the usufructuary mortgagees

Held, that they were entitled to possession and that the non-payment of the premium was no answer to their suit for possession.

A lease is a transfer of a right to enjoy property, and the right of the lessee to be put into possession arises from the words of the demise which imply that the right to possession is granted to the lessee. and the lessor, is not entitled to refuse to give up possession to the lessee unless the document provides that the latter is not to have possession until the fulfilment of a certain condition.

Appeal under Cl. 15 of the Letters Patent against the judgment of Mr. Justice Kumaraswami Sastri in A. S. No. 64 of 916, preferred against the decree of the Court of the Temporary Subordinate Judge of Madura in O. S. No. 10 of 1914.

[The facts are set out in the judgment of Abdur Rahim. J.]

S. Parthasarathi Aiyar, for Appellants.

K. Rajah Aiyar, for Respondents.

The Court delivered the following

Abdur Rahim, J.

Judgments :—*Abdur Rahim, J* :—I entirely agree with the judgment of the learned Chief Justice and will only shortly give my reasons for the conclusion I have arrived at. The plaintiffs obtained a lease for 17 years of a certain garden, from the owner of the property, the 1st defendant in the suit. The document provides that the plaintiffs are to discharge a prior encumbrance to the extent of Rs. 2,805, besides making two other small payments. They failed to discharge the encumbrance and the mortgagee whose debt they had bound themselves to discharge brought a suit to enforce the mortgage and obtained a decree. In the meantime while the suit was pending, the 1st defendant

* L. P. A. No. 186 of 1917. 30th September, 1918.

Kandasami Pillai. v Ramasami Mannadi.

Abdur Rahim, J.

granted a usufructuary mortgage to defendants 4 to 7 and with the money so realised the mortgage decree was paid off. The Subordinate Judge in the court of trial held that since the plaintiffs failed to pay the amount stipulated for in the document, they were not entitled to possession of the properties, which was their chief prayer in the plaint. On appeal to this court, the learned Chief Justice was of opinion that the fact that the plaintiffs had not paid the amount mentioned in the lease, was no answer to their suit for possession ; while Kumaraswami Sastri, J , the other learned Judge who heard the appeal, disagreed and confirmed the decree of the Subordinate Judge.

On behalf of the respondents, Mr. K. Raja Aiyar sought first of all to argue that the document in question, Ex. L was not a lease at all, but a mere contract with respect to the future produce of certain trees. In the first place, this was not their case up till now, and the written statement itself proceeds on the assumption that Ex. L is a lease. No doubt it is called a contract relating to coffee and plantain produce. But that description is not *ipso fact* conclusive. We find that the document goes on to state "I have granted to you on lease the coffee, plantain and jack produce belonging to me." Further it says, "you shall enjoy according to your choice the coffee, plantain and jack produce for * * * * 17 years from this date, and on the expiry of the term surrender the lands to me without any objection whatsoever. The assessment due for this land shall be paid by me." Then it gives the boundaries of the land. There can be no doubt whatever that what the parties contemplated was a lease. We have got all the apt words of a conveyance by way of a lease. There would be no sense in talking about surrendering the lands, if it was only the future produce of certain trees apart from any interest in the land that was meant to be granted. Proceeding on that basis, there cannot be any doubt to my mind upon the authorities that the lessee is entitled to possession of the land demised to him, even though he has not paid the premium he bound himself to pay. This is an agricultural lease and therefore the Transfer of Property Act in its terms does not apply. But the Transfer of Property Act, when it defines a lease of immoveable property by S. 105, gives a definition which is undoubtedly applicable to agricultural leases as well in this country. Mr. Rajah Aiyar did not

Randasami Pillai. v Ramasami Mannadi.

Abdur Rahim, J.

attempt to argue that the definition of a lease as contained in S. 105 is not applicable to agricultural leases. S. 105 says: " A lease of immoveable property is a transfer of a right to enjoy such property, etc." Now S. 108 lays down the rights and liabilities of the lessor and the lessee. Cl. (b) of that section provides that 'the lessor is bound on the lessee's request to put him in possession of the property', and clause (e) says that, 'the lessee is bound to pay or tender, at the proper time and place, the premium or rent to the lessor or his agent in this behalf.' And it is argued that this is a case of reciprocal contracts, and that the lessor is only bound to put the lessee in possession after the lessee has paid or is prepared to pay the premium that is agreed upon. This, to my mind, proceeds entirely on a misconception of the true nature of a lease and of the rights of the parties arising from such a transaction. 'It is not a mere contract, it is a transfer of a right to enjoy the property.' That means it is a transfer of an interest in immoveable property, and S. 108 assumes it is a transfer of such an interest. The right of the lessee to be put into possession arises from the words of the demise which imply that the right to possession is granted to the lessee, and the lessor is not entitled to refuse to give possession to the lessee unless the document provides that the latter is not to have possession until the fulfilment of a certain condition. It is found by both the courts that no such condition exists in this case. No doubt there are also other rights and liabilities both of the lessor and the lessee, which are set out in S. 108, Transfer of Property Act, and which arise out of the general law governing the relations of landlord and tenant. " The liability of the lessor to put the lessee in possession, may be said to arise out of the implied covenant applying to leases," as put by my learned brother, Coutts Trotter, J., in *The Secretary of State for India in Council* v. *Venkayya.* [1] The distinction between executory and executed contracts is well-known as pointed out in *Wolverhampton and Walsall Railway Co.* v. *London and North Western Railway Co.* [2]. "A lease is an executed contract, it is a transfer of property or of an interest in property; and all the considerations which apply to the enforcement of mere contracts do not necessarily apply to a transfer."

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1. (1916) I. L. R. 40 M. 910=30 M. L. J. 575. 2. 16 Eq. cases 433.

Kandasami Pillai v. Ramasami Mannadi.

Abdur Rahim, J.

We have been referred to a number of cases both of this court and other courts in which it is laid down that a vendee of immoveable property is entitled to possession of the property even though he has not paid the consideration mentioned in the deed of sale, (see for instance *Velayutha Chetty* v. *Govindasami Naicken* [1], *Velayutha Chetty* v. *Govindasmi Naicken* [2] and *Govindammal* v. *Gopalachariar* [3]) and this proposition Mr. Rajah Aiyar has not contested before us. But he says there is a distinction between a sale and a lease. His argument is that a lease for a term stands on no higher footing than a mere contract, and he has referred us for this position to the English Law. In English law no doubt a lease for a term is a mere chattel interest and has been treated as such in some of the cases, for instance, by Justice Chitty in *Wallis* v. *Hands* [4]. But he has not been able to cite any Indian cases to show that these technical distinctions of English law between real and chattel interest in land obtain in India. Speaking for myself, I am not aware that the peculiarities of English Law as regards leases for a term have ever been adopted in this country. The law regarding real property in India is in many respects very different from that of England, and it is especially so regarding leases; for instance Indian law recognises leases in perpetuity which are unknown to the English law, though it recognises leases for such terms as 99 years or 999 years. And I do not think I should be justified in importing the technicalities of English law relating to leases for terms into this country.

Mr. Rajah Aiyar's main argument has been that there is some sort of equity in his client's favour, and therefore we ought to deny the plaintiffs the remedy which they seek, *viz.*, recovery of possession. What the plaintiffs seek is a remedy in law, and their right to possession cannot be defeated by pleading *laches* or any other considerations of that kind, which might be effective if the suit was one for some relief in equity. Reliance was placed on S. 39 of the Indian Contract Act, IX of 1872. But this is not a case for enforcement of a contract. The plaintiff's right to possession arises out of the interest which they have acquired in the landand the doctrine regarding mutual promises has therefore no application. Then we have

1. (1910) I. L. R. 34 M. 543.
2. (1907) I. L. R. 30 Mad. 524.
3. (1905) 16 M. L. J. 524.
4. L. R. (1893) 2 Ch. 75

Kandasami Pillai v. Ramasami Mannadi.

Abdur Rahim, J.

also been referred to S. 35 Specific Relief Act which deals with rescission of contracts on grounds of misrepresentation, fraud and the like. Our attention was specially drawn to the illustrations which speak of rescission of sale and other transfers, on the ground mentioned in the section. But the section deals with cases in which the contract is vitiated by reason of misrepresentation or fraud, and, if the contract which led to the transfer is voidable, that is, liable to be set aside, the transfer based upon it necessarily fails. But the plea of the respondents in this case is based not upon anything which would make the contract relating to the lease liable to be set aside, but on something which happened after the grant of the lease, *viz.*, non-payment of a certain sum of money mentioned in the lease. S. 35 Specific Relief Act, has no application.

Reliance has been placed on two decisions, one of the Allahabad High Court, in *Chotku Rai* v *Baldeo Shukul* [1] and another of this court, in *Subba Rao* v. *Devu Shetti* [2], the former is referred to by Kumaraswami Sastri, J., in his judgment. In the Allahabad case, certain property was mortgaged, and only a portion of the mortgage amount was paid. The mortgagor sold the mortgaged property and his assignees sued for redemption of the mortgage before the expiry of the term of the mortgage; and it was held on equitable grounds that the plaintiffs should be allowed to redeem before the expiry of the specified term. The learned Judges do not however, lay down any general principles of law which I should feel justified in adopting and applying to this case; all that they say is, that "the defendants not having performed what we deemed to be a most essential part of the contract so far as they are concerned, the plaintiffs ought to be allowed to redeem the property before the expiration of 10 years." They cite no authority and do not enunciate any general and well recognized principle of equity by which the case could be said to be governed. With all respect to the learned Judges, it is not open to us to proceed on some sort of vague equitable grounds, especially in a case like this, where the plaintiffs are seeking a remedy in law. As regards *Subba Row* v. *Devu Setty* [2] one of the learned judges, Muthusami Aiyar, J. says in his judgment "Upon the facts found the Subordinate Judge obviously considered the original mortgage as lawfully

1. (1912) I. L. R. 34 A 659
2. (1894) I. L. R. 18 M 126

Kandasami Pillai v. Ramasami Mannadi.

Abdur Rahim, J.

cancelled." The facts of that case are not to be found in the report and it is not clear how the instrument came to be cancelled. I do not think that the judgment can be said to lay down any general proposition that can be applied to the present case.

I am of opinion that the judgment of the learned Chief Justice is right. It was noticed during the course of the argument that the learned Chief justice gave a decree to the plaintiffs on condition of their paying the prior mortgage and that respondents 4 to 7 were entitled to retain possession until they have been re-paid. But the form of the decree has not been challenged before us by the learned pleader for the appellants.

The result therefore will be that the judgment of Kumaraswami Sastri, J., is set aside and there will be a decree in favour of the plaintiffs to the effect that they will be entitled to possession of the property on paying the money due under the mortgage decree in O. S. No 87 of 1912, and until then respondents 4 to 7 will remain in possession. The appellants are entitled to their costs throughout.

Oldfield, J

Oldfield, J :—I agree.

Coutts Trotter, J.

Coutts Trotter, J:—I agree and wish to add only a few words. The appellants (plaintiffs) were lessees under a deed of lease, and I have no doubt that the deed of lease was a present demise and nothing else. As long ago as the case of *Holder* v. *Taylor* which was decided in the beginning of the 17th century it was laid down that the word 'demise' in a lease involves by necessary implication a covenant or contract or call it what you will on behalf of the lessor to give instantaneous and complete possession to the lessee. In this case, the lessor was under an obligation to give possession to the lessees. Certain other obligations were cast on the lessees by the instrument of lease, and among them was an obligation to discharge an existing encumbrancer by the payment of certain sums of money. The plaintiffs failed to do that. They broke their obligation to pay off this encumbrancer and the result was that respondents 4 to 7 in this case stepped into the breach, paid off the old encumbrancer, and took from the owners of the land an usufructuary mortgage. The mortgage paid off was not an usufructuary mortgage, but a simple hypothecation without rights of possession. The question is whether the respondents 4 to 7 can be allowed

1. (1613) Hobart 12.

Kandasami Pillai v. Ramasami Mannadi.

Coutts Trotter, J.

to plead their usufructuary mortgage in derogation of the right claimed by the plaintiffs.

Now, as I understand it, you can defeat the right to possession under a lease in various ways. If it is only an agreement for a lease, all sorts of equitable pleas are open by way of reply to an action for specific performance, and any breach of contract by the person seeking to enforce the contract and any breach by him of any of the provisions of the contract, might be a very excellent answer to his suit for specific performance. If it is a demise, you can show that there was a condition precedent to its taking effect as such. That is just what was attempted to be done in this case. That defence broke down and it was held that the obligations of the lessees were not conditions precedent, but were merely mutual concurrent contracts or covenants between lessor and lessee. Or you can show that the whole thing is void, because the making of the contract was vitiated by fraud, coercion or misapprehension. That is not this case, and no such ground is suggested. What is the result? The result is that the respondents are seeking to destroy the right to possession given by the instrument by setting up a breach of contract which arose subsequent to the obligation to give possession. That seems to be an obviously impossible defence. It is for the safe-guarding of those rights of a lessor that covenants of re-entry are inserted in leases, whereby a breach of contract by the lessee subsequent to the lease may entitle the lessor to re-enter and get back possession of the land. But in my opinion that must be under a specific covenant of re-entry in the lease. If there is no such clause, there can be no right to get back possession of the land. If S 39 of the Contract Act applies, this document is not a transfer of property or of any interest in the land, but is a mere bundle of mutual obligations under a contract. I think much confusion has arisen from the fact that the English Law of Real Property makes a very sharp distinction between those rights over Property which are termed "real" rights and "chattel" interests in property which are mere personal rights. I think that is a peculiar incident of the English law of property with its very curious history. and it seems to me that it is not necessary to complicate Indian law by seeking to import, such technicalities of English law into India. In the case in *Secretary*

Kandasami Pillai v. Ramasami Mannadi.

Coutts Trotter, J.

of State for India in Council v. Venkayya [1], I took very great care, in deciding the question of leasehold interest which there came up, not to base my judgment on technicalities peculiar to English Real Property law but on general principles which seemed to me to apply. I think that the introduction of the English conception of chattel interests in land might lead to the conclusion that nothing had passed by way of transfer, that there was a mere bundle of rights and that S. 39 of the Contract Act applied. To my mind that could be arrived at only by importing the English doctrine and speaking for myself, I must decline to adopt that course. That being so, I regard this instrument not as a mere executory contract but as a transfer of an estate. S. 39 of the Contract Act, in my opinion, applies only to a state of things where there is a series of executory promises on both sides and so soon as one part of the obligation has been performed by a complete transfer of the property in question, that section ceases to have any application.

As regards the decision in *Chotku Rai* v. *Baladeo Shukul* [2] all I can say is that I do not understand it as reported, nor do I gather upon what principle the learned Judges proceeded. With regard to the case in *Subba Rao* v. *Devu Shetti* [3] I have no hesitation in saying that unless it can be explained by an omission in the report as to the existence of an express power of cancellation, it must be regarded as contrary to the trend of authority.

I think that the order of the learned Chief Justice is right. It may be that the appellants might have got further relief. But they have contented themselves with the Chief Justice's judgment.

N. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(FULL BENCH)

PRESENT:—SIR JOHN WALLIS, CHIEF JUSTICE, MR. JUSTICE AYLING, MR. JUSTICE COUTTS TROTTER, MR. JUSTICE SESHAGIRI AIYAR AND MR. JUSTICE KUMARASWAMI SASTRI.

F. B.

Periakaruppa Mukkandan v. Raja Rajeswara Sethupathi.

Periakaruppa Mukkandan and others ... *Appellants* Defendants.*

v.

B. Raja Rajeswara Sethupathi *alias* Muthuramalinga Sethupathi. *Respondent in all.* (*Plaintiff*).

Madras Estates Land Act, S. 13 (3)—Landholder and ryot—Rent—Right of landholder to claim enhanced rate for garden crops raised by ryots with water from wells

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* S. A. Nos. 1449 to 1472 of 1917. 4th December, 1918.

1. (1916) I. R. 40 M. 910=30 M.L.J. 575. 2. (1912) I. L. R. 34 A. 659.
3. (1894) I. L. R. 18 M. 126.

F. B.

Periakaruppa Mukkandan v. Raja Rajeswara Sethupathi.

dug at their own expense—Implied contract supported by consideraiton—Presumption of, from payments for a long series of years—Ramnad Zemindari—Custom of rent being charged only on cultivated lands and not on waste lands—Legality of.

Where the ryots of a Zemindari raised garden crops on dry lands with the aid of water from their own wells, the Zemindar claimed rent according to the garden rates which was higher than the ordinary dry rate on these lands. It was found that for a long time garden rates had been paid by the ryots on the lands so cultivated. On a question being raised as to whether an agreement to pay the higher rate, supported by consideration, could be inferred from such long continued payments

Held Per *Chief Justice*:—A court can infer a contract supported by consideration, to pay rent at an enhanced rate from a long continued course of payment of the enhanced rate if that is the sole fact that the court has to go upon. But in dealing with the question of presuming the agreement and the consideration therefor that together make up a contract, the court should not be governed by that fact alone but should come to a conclusion on all the circumstances of the case.

Per *Ayling, J*:—The imposition of garden assessment where rent had previously been paid at dry rates is an enhancement of rent. Where it is sought to base liability to pay such enhanced rent on an alleged contract to pay, a court cannot infer consideration for the contract solely from a long continued course of payment of the enhanced rent.

Per *Coutts Trotter, J*:—If the long continued payment of rent were the sole fact before the court, it would be entitled to presume consideration from it ; but if there are other facts before the court it must refuse to treat the payment as raising a presumption and while giving it such weight as it thinks fit, perhaps a determining weight, treat it merely as a portion of the evidence in the case subject to be weighed against and perhaps overstopped by the evidence on the other side.

Per *Seshagiri Iyer, J*:—A course of payment, if nothing else appears, may be an element to be considered in arriving at the conclusion whether there was consideration for it or not, but if there was a fixed payment before and the rate was enhanced solely because the tenant has cultivated new crops by his own exertions, there is no room for presuming consideration under such circumstances.

Per *Kumaraswami Sastri, J*:—It is open to the court from a long and uniform course of payment to presume that there was an agreement to pay which had a lawful origin and was supported by consideration, where it is satisfied that it would be unreasonable from lapse of time or other circumstances to call upon the landlord to give direct evidence as to the circumstances that gave rise to the payment, and when circumstances exist which would render the drawing of the presumption reasonable in law and probable in fact. If all that appears is a long course of payment, there is no reason why the presumption should not be drawn.

Arumugam Chetty v. *Raja Jagavera Rama Venkateswara Ettappa* [1], *Raja Jaga-Veera Rama Venkateswarv Ettappa* v. *Alwarasa Asari* [2], *Goodman* v. *Mayor of Saltash* [3], *Gann* v. *Free Fishers of Whitstable* [4] *Referred to.*

Per *Ayling and Krishnan, JJ.*—According to a custom prevalent in some parts of the Ramnad Zemindari the land-holder is entitled to charge rent only for lands

1. (1905) I L. R. 28 M. 444.
2. (1918) 36 M. L. J. 49 (P. C.)
3. (1882) L R. 7 A. C. 623.
4. 11 H. L. C. 193.

F. B.

Periakaruppa Mukkandan v. Raja Rajeswara Sethupathi.

cultivated by the ryots and the latter are not liable to pay rent for lands left uncultivated for any reason other than their own neglect. Such a custom is neither unreasonable nor opposed to law. *Arunachlalam Chettiar* v. *Mangalam* [1] followed.

Second Appeals against the decree of the District Court of Ramnad at Madura in Appeal Suits Nos. 272, 275 to 289, 292 to 298 and 316 of 1916, preferred against the decrees of the Court of the Special Deputy Collector of Ramnad in Summary Suits Nos. 1821, 1828, 1831, 1833 to 1836, 1841 to 1843, 1845. 1847, 1849, 1853, 1855, 1856. 1864, 1866, 1867, 1869, 1870 and 1824 to 1826 of 1915 respectively.

The Court (Ayling and Krishnan, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

Ayling, J.

Ayling, J.:—These Second Appeals arise out of suits for rent for Faslis 1321—1323 brought by the Rajah of Ramnad against certain ryots of Nochiurani Village: and the two points for our determination relate to the liability of the tenants to pay (1) rent on dry waste, (2) garden rates (Kuli Teervâ) on vanpayir crops raised with the aid of their own wells.

As regards the first, the District Judge finds "that from time immemorial only cultivated lands were charged and no rent was payable in respect of waste lands. The landlord has consequently a right to claim rent only in respect of cultivated lands by virtue of S. 4 of the Act read with Ss. 27 and 28: Vide *Arunachalam Chettiar* v. *Mangalam* [1] a case which relates to the Ramnad Zamindari." He proceeds however to state that although the lands were only occasionally cultivated, they contained a large number of trees which are a source of profit to the ryots: and concludes that there is nothing unreasonable in the defendants being required to pay rent for use and occupation of the land. He therefore decided the point in favour of the landlord.

In my opinion this reasoning is inadmissible. The custom of the estate has been found and whatever may be thought of its reasonableness, if the terms of tenancy had to be fixed for the first time, it is certainly not one which the law would refuse to recognise. It has, in fact been recognised in this very estate in the case above referred to and must be followed now, unless the landlord can show an enforceable contract to the contrary. The law on the subject is clearly expounded in the case in question which I have no hesitation in following.

The Vakil for Respondent has argued that the decree of the Lower Courts can nevertheless be supported on the basis of a contract to pay contained in the muchilikas Exhibits B and E series. This is one basis

1. (1915) 40 M. 540=31 M. L. J. 168.

F. B.

Periakaruppa Mukkandan v. Raja Rajeswara Sethupathi.

Ayling, J.

of the Deputy Collector's finding though it is not relied on by the District Judge. It is a fact, that for the suit faslis most of the defendants executed muchilikas undertaking to pay the rents now claimed on their holdings "inclusive of tarisu." Whether this condition, inserted for the first time, was understood by the ryots may be doubted: but in any case the agreement to pay can only be enforced against them if it was supported by consideration. No consideration is found or appears on the evidence: and the only consideration that the Respondent's Vakil can suggest is that plaintiff newly admitted defendants to tenancy of the lands regarding which the dispute arises. But no such suggestion has ever been made in the Lower Courts; and it is perfectly clear from the judgments of both Courts as well as the pleadings that the suits have been tried on the understanding that the defendants have held the disputed waste lands in previous faslis, although rent was only levied on them, when they were actually cultivated with crops. This suggestion of possible consideration (it is no more) cannot therefore be seriously entertained. It follows that the contract to pay contained in the muchilikas is unenforceable. In my opinion the suits, as far as they relate to the charge for dry waste, must therefore be dismissed.

I now pass to the second point. The suits have been tried on the footing that the vanpayir crops were raised with the water of the ryots' own wells (*vide* issue 2); and we must take this to be the case. It is further admitted that garden rates have always been paid on the lands so cultivated except during the period of 12 years from 1878 to 1890, during which the Zamindari was under the Court of Wards. During this period the lower dry rate (Kurukkam teerva) only was collected: but when the estate was handed over to the Rajah the previous practice was reverted to and remained in force till the suit faslis. Appellants' Vakil argues relying on *Arumugam Chetti* v. *Raja Jagaveera Rama Venkateswara Ettappa* [1], and the cases which follow it, that this long continued course of payment is of no avail to plaintiff's case; that a *custom* to pay enhanced rent in consequence of the tenant's own improvements is unenforceable, and that a *contract* to do so is only enforceable on proof of consideration, which cannot be inferred merely from the long continuance of payment. That the claim of the landlord cannot be based on *custom* is not disputed before us: but it is argued by Respondent's Vakil that it has been held in more recent cases that a long continued payment of higher rent may be legitimate basis for the inference that there was consideration for the tenant's agreement to pay, and that in this case there is actual evidence of consideration. As regards the first point there seems to me to be an irreconcilable difference between the view in *Arumugam Chetti* v. *Raja Jagaveera*

1. (1904) I. L. R. 28 Mad. 444=15 M. L. J. 292.

F. B.

Periakaruppa Mukkandan v. Raja Rajeswara Sethupathi

Ayling, J.

Rama Venkateswara Ettappa [1], *Arumugam Chetti* v. *Raja Jagaveera Rama Venkateswara Ettappa* [2], and *Arunachalam Chetty* v. *Syyad Ahammed Ambalam* [3], on the one hand, and *Sri Mahant Prayag Dasje* v. *Vengama Naidu* [4], and a recent unreported case, *Ramachendra Thevar* v. *Velayutha Nadan*, (S. A. Nos. 1639 to 1644 of 1916) on the other, I think our proper course is to refer the question to a Full Bench, provided that its decision is essential to the determination of the case.

This brings us to the question of the other evidence. The only evidence to which we are referred by Respondent is the statement of P. W. 1: "originally all the lands, wet and dry, were on a varam basis: afterwards dry lands cultivated with ragi varagu, etc., were charged 5¼ fanams per kurukkam and crop-war rates were charged for dry vanpayir crops." We are asked to interpret this as meaning that the consideration for the tenants paying the garden rates (5¼ fanams a kurukkam) was the landlord's abandonment of his right to insist on, or revert to, the varam system. I cannot read anything of the kind into it: and neither of the Lower Courts appear to have taken it, as raising such a plea. Both have based their decisions solely on the long course of payment: and I think we are justified in proceeding on the footing that the only evidence of consideration is that deducible from the long course of payment.

It is suggested on the other side that the interruptions from 1878 to 1890 stand in the way of the desired inference being drawn. I do not think this contention can be admitted. If it is open to a Court to draw the inference of consideration from a long course of payment, it will be for that Court to consider the weight to be attached to an interruption. In the present instance I should be inclined to attach very little. The Court of Wards was probably desirous of bringing the practice into conformity with the system prevailing in ryotwari tracts, where Government on grounds of public policy as well as equity was careful to encourage all ryots to improve their lands by the certainty of reaping the full benefit of such improvement. The fact that as soon as the estate was handed back to the proprietor the old system was reverted to apparently without opposition, would weigh more with me than the fact of interruption.

It seems to me therefore that the decision of this part of the case depends solely on the legitimacy of the inference drawn by the Lower Courts from the long course of payments: and I would refer the following question for determination by a Full Bench.

"Where it is sought to base liability to pay enhanced rent on an alleged contract to pay, can a Court infer consideration for

1. (1905) I. L. R. 28 Mad. 444.
2. (1910) I L. R. 35 Mad. 134.
3. (1915) 2 Law Weekly, 1117.
4. (1918) 7 Law Weekly, 477

F. B.

Periakaruppa Mukkandan v. Raja Rajeswara Sethupathi.

Krishnan, J.

such a contract solely from a long continued course of payment of the enhanced rent?"

Krishnan, J:—The first point that arises for consideration is whether the ryots are bound to pay rent on waste land left uncultivated in their holdings during the suit faslis. The District Judge has found that from time immemorial no rent has been charged in respect of waste lands in this Zamindari till 1910; nevertheless he held that as the odai and palmyra trees on such lands were a source of profit to the ryots they should pay rent for them also. These lands are said to be of sandy soil cultivable only once in 5 or 10 years; and their non-cultivation during the suit faslis is not shown to be due to any neglect on the part of the ryots; admittedly till fasli 1320 no rent was charged for them when uncultivated even though the ryots were in the habit of enjoying the odai and other trees on them. The custom relied on by the ryots must be held to be not unreasonable so far as it is not applied to lands left uncultivated through the neglect of the tenants, on the authority of the ruling in *Arunachalam Chettiar* v. *Mangalam*[1] where the question was considered at some length. That being so the attempt of the Rajah now to compel the tenants to pay rent on them by getting muchilikas from them cannot be supported as it would virtually amount to an enhancement of the rent of the holding and offend against S. 24 of the Estates Land Act, see *Segu Rowthen* v. *Alagappa Chetty*[2] per Tyabji, J. I therefore agree with my learned brother that the charge for dry waste must be disallowed.

The 2nd point has reference to the charge of Kuli teerva for vanpayir or garden crops cultivated with water from the tenant's own wells. The Lower Courts have allowed this charge to the landlord on the basis of an implied contract which they have rightly inferred from a long continued course of payment extending at least to 40 years. It was argued that S. 13, cl. 3 of the Estates Land Act rendered such contracts invalid after the passing of the Act. The question whether the clause applies to contracts before the Act was considered and decided against the appellants' contention by two of the learned Judges in *Venkata Perumal Raja* v. *Ramudu*,[3] and I am prepared to follow their view.

The only other point argued was that the Court could not imply a contract from long continued payment without independent proof of consideration for it as it was said that consideration could not be presumed from such payment however long it might have continued. The point is a small one but as shown by my learned brother there is a definite difference of opinion on it in our Court. The proposition

1. (1915) 31 M. L. J. 168. 2. (1913) 26 M. L. J. 269.
3. (1915) I. L. R. 39 Mad. 84=28 M. L. J. 81.

F. B

Periakaruppa Mukkandan v. Raja Rajeswara Sethupathi.

Krishnan, J.

was supported in *Arunachalam Chetty* v. *Syyad Ahammed Ambalam* [1] but that ruling was dissented from in *Sri Mahant Prayaga Doss jee* v. *Vengama Naidu*, [2] which was followed in *Ramachendra Thevan* v. *Velayutha Nadan*, (S. A. 1636 to 1644 of 1916) (unreported) to which ruling I was a party. The same view was taken in *Venkata Perumal Raja* v. *Ramudu*, [3] by both the learned Judges who originally heard the case. The question also arose in *Arumugam Chetti* v. *Raja Jagaveera Rama Venkateswara Ettappa* [4] and *Arumugam Chetty* v. *Raja Jagaveera Rama Venkateswara*, [5]. In the former the period was too short for any inference, being only 18 years. In the latter the judgment says " consideration may be of the same *implied* nature as the covenant to pay." As my learned brother proposes that the question should be settled by a reference to the Full Bench, I think I must consent to that course.

The question to my mind is not really one of implying consideration as distinguished from implying an agreement but of attributing a legal origin to a long continued course of payments. If we are justified in applying the doctrine of legal origin to the case, as I think we are, the result is a valid implied contract and as all valid contracts must be supported by consideration, there will be a presumption of consideration also. If there is evidence to rebut such inference it will not of course be drawn. But if there is not I do not see any difficulty in implying consideration from the same long course of payments from which the agreement to pay is inferred without any independent evidence for it.

As however there is a differcnce of opinion on the point, it may be settled by the Full Bench.

K. S. Ramabhadra Aiyar for Appellants.

K. Srinivasa Aiyangar with *R. Krishnamachariar* for Respondent.

The Court expressed the following

Wallis, C. J.

Opinion :—*Wallis, C. J.*:—There has been some discussion as to the meaning of the words "liability to pay enhanced rent on an alleged contract to pay" in the question referred to us. Whether or not these words are wide enough to cover, not only a fresh contract enhancing the rent already payable under a binding contract, but also an increased demand under an original contract to pay rent at rates varying with the crops, a well-known kind of tenancy recognised in S. 29 of the Madras

1. (1915) 2 L.W. 1117
2. (1918) 7 L.W. 477.
3. (1915) I. L. R. 39 Mad. p. 84=28 Mad. L. J. 81.
4. (1905) I. L. R 28 Mad. 444.
5. (1910) I. L. R 35 Mad. 134.

F. B.
Periakaruppa Mukkandan v. Raja Rajeswara Sethupathi.
Wallis, C. J.

Estates Land Act, 1908, which may well have become payable under a contract to substitute money rents for the old sharing system of the country, the possibility of there having been a contract of either kind, ought in my opinion to be taken into consideration in deciding whether or not to presume a contract supported by consideration. That an implied contract within the meaning of S. 11 of the Rent Recovery Act, 1865, to pay rent at a certain rate may be inferred from payments for a long series of years was decided in *Venkatagopal* v. *Rangappa* [1] which is referred to with approval at the outset of Lord Sumner's judgment in the recent case *Raja Jagaveera Rama Venkateswara Ettappa* v. *Alawarasa Asari* [2] and in the case of ryots admitted before the passing of the Madras Estates Land Act, 1908, such contracts remain in force in the absence of any provisions in the Act interfering with them.

In *Arumugam Chetti* v. *Raja Jagaveera Rama Venkateswara Ettappa* [3], at an earlier stage of the case last mentioned, Subramania Aiyar, J., after pointing out that to presume a contract you must presume consideration as well as agreement, a ruling which is now confirmed by their Lordships' Judgment, went on to observe : "if in cases like the present, payments at the higher rate had continued to be made for a great many years so as to make it unfair to the landholder, on account of such lapse of time, to be compelled to prove the existence of some consideration when the payment commenced, it may be a question whether the Courts should not presume a lawful origin for the payment, on the analogy of the lost grant principle availed of to support long possession and enjoyment." In *Venkata Perumal Raja* v. *Ramudu* [4], the learned Judges cited this sentence and answered the question in the affirmative, in my opinion rightly, and the District Judge purported to follow their decision in the case which gave rise to this reference. This ruling in my opinion is not affected by the recent decision in *Raja Jaga Veera Rama Venkateswara Ettappa* v. *Alawarasa Asari* [2]. There are also other decisions to the same effect referred to in the opinion of Kumaraswami Sastri, J. which I have had the advantage of reading. In that case, as observed by Lord Sumner,

1. (1883) I. L. 7 Mad. 365.
2. (1918) M. W. N. 732 : 36 M. L. J. 49.
3. (1905) I. L. R. 28 Mad. 444.
4. (1915) I. L. R. 39 Mad. 84.

F. B.

Periakaruppa Mukkandan v. Raja Rajeswara Sethupathi.

Wallis, C. J.

this court in the judgment under appeal had ruled that the question was "whether a presumption of the fact of an implied contract arose in any particular case on the facts of that case.' Their Lordships accepted this position and also the ruling of this court that there was not sufficient reason to differ from the District Judge's finding that an agreement might be presumed although in the particular case of Arumugam Chetty, which was treated as typical of the ninety suits, the enhanced rate had only been paid in the year before suit. "The question" as Lord Sumner observed " then came to be that of consideration for the subsequent agreement at garden rate thus implied." As regards this question, as was repeatedly pointed out, the Zemindar's case throughout "was that of a new promise to pay at the rate of 8 fanams for land, which was already held on a binding contract of tenancy at the rate of 4 fanams per kuli" and not an original contract to pay rent at rates varying with the crops. For such a new contract Lord Sumner agreed with the High Court that there was no consideration in that case, but he went on to say "If the cases had been examined separately, if distinctions had been drawn between cases where the higher rate was paid for forty years and cases where it was only paid once or twice, if the possibility of presuming a lost pattah at 8 fanams or lost proof of consideration had been mooted, if the origin of these tenancies had been investigated and the terms of the original contracts fully discussed other questions might possibly have arisen." All these questions were ruled out owing to the course the case had taken, but the judgment in my opinion sufficiently indicates that they are all matters which ordinarily may and ought to be considered. The question referred to us is, whether a Court can infer consideration for a contract to pay rent at an enhanced rate "solely from a long continued course of payment of the enhanced rate. My answer is that it may if that is the sole fact it has to go upon; but that in dealing with the question of presuming the agreement and the consideration therefor that together make up a contract, the court should not be governed by that fact alone but should come to a conclusion on all the circumstances of the case.

Ayling, J.

Ayling, J. :—As a member of the referring Bench I must endeavour to make two points clear, concerning both of which there has been a certain amount of misapprehension.

F. B.

Periakaruppa Mukkandan *v.* Raja Rajeswara Sethupathi.

Ayling, J.

The first is this. The case was argued before us, and our reference was made on the following basis of facts: that in each case the payment of the rate of rent now demanded commenced from the digging of the well and the consequent raising of a more valuable crop by its aid by the tenant that the well was dug by the tenant at his sole expense and that prior to the digging of the well, rent was being paid at a lower rate than the rate paid thereafter.

It would perhaps have been better if the above facts had been set forth specifically instead of being to some extent implied in my order proposing a reference, but the latter was framed in the light of the arguments addressed to us, and I venture to think it leaves no room for doubt, if carefully perused. That the vanpayiar crops were raised with the water of the ryots' own wells is distinctly stated, and I think the use of the term "enhanced rent" in the question is sufficient to imply the existence of a prior state of affairs, in which rent was paid at a lower rate. *Fischer* v. *Kamakshi Pillai* [1], is sufficient authority for holding that the imposition of garden assessment where rent had previously been paid at dry rates is an enhancement of rent. The second point relates to the theory of an original contract of tenancy at the time of the commencement of the latter to pay rents varying with the crop raised. This theory in connection with the cases before us appears to have been first brought forward by Mr. K. Srinivasa Iyengar at the present hearing. It was never set up in the argument before Mr. Justice Krishnan and myself and I do not find a single word in the judgments of the lower Courts to suggest that it was raised before them. The contract which we were asked to imply was a fresh contract contemporaneous with the digging of the well in each case, whereby the rate of rent previously paid was to be enhanced. This is the kind of contract contemplated in the order of reference—precisely similar to that which was considered by the Privy Council in the recent case (*Raja Jagaveera Venkateswara Ettappa* v. *Alawarasa Asari* [2].

If the question be considered in the light of the above explanation, I think it should be answered in the negative. If we understand "consideration" for a contract to imply something moving from the promisee, I fail to see why a continued course

1. (1897) I. L. R. 21 Mad. 136.

2. (1918) 36 M. L. J. 49.

F. B.

Periakaruppa Mukkandan v. Raja Rajeswara Sethupathi.

Ayling, J.

of payment of rent at a particular rate however far it may go back, should imply consideration, always provided that a previous state of affairs is proved in which a different and lower rate was paid. A long course of payment no doubt indicates that the tenant agreed to pay. But it throws no light on why he agreed to pay at the higher rate. He may have agreed (1) for some consideration moving from the landlord; but he may have agreed (2) because he was afraid to resist his landlord's demand or (3) simply because he looked around and saw other tenants in similar circumstances paying rent at the higher rate—in other words because it was customary. Such a custom (of charging extra rent for a tenant's own improvements) is, I need hardly say, unenforceable at law both before and after the enactment of the Estates Land Act: *vide* S. 13 of the Madras Estates Land Act, S. 11 Rent Recovery Act, in *Fischer* v. *Kamakshi Pillai* [1] and in *Arumugam Chetti* v. *Raja Jagaveera Rama Venkateswara Ettappa* [2]. It is at the same time extremely ;despread a fact which, I think, no one will deny.

There may be other explanations besides the three I have indicated above : but simply dealing with these three, I fail to see why No. (1) should be taken to be the most probable. No. (2) is, to my mind at least, as likely in view of the conditions which formerly prevailed, and prevail even now to some extent, in Zamindari tracts. But No. (3) seems to me the most probable of all. It is difficult to exaggerate the extent to which custom or mamool governs the action of the tenantry. It is prominently referred to, for example, even in the muchilikas filed in these suits (Exhibits B and E series) in which the tenant undertakes "I shall in accordance with the custom of the Zamindari pay," etc.

It may be argued (and I am fully alive to the force of the argument) that, where a known result may be due to more than one cause, the determination of which is the true cause is a question of fact. But an implied contract may be a question of law : *vide* Sankaran Nair, J., in *Nagu Chetty* v. *Bhaskara Setupathi* [3]. Where the data are limited and ascertained it may not be impossible to lay down a rule of law that such data in themselves are not sufficient to justify a particular inference : and where (as here) the cause sought to be inferred is, on the

1. (1897) I. L. R. 21 M. 136. 2. (1905) I. L. R 28 Mad. 444.
3. (1911) 1 M. W. N. 6.

F. B.

Periakaruppa Mukkandan v. Raja Rajeswara Sethupathi.

Ayling, J.

data available, the least probable of three possible causes, I think it may be laid down as a rule of law that such an inference is not to be drawn in the absence of other evidence to support it. As a somewhat analogous case I may mention *Raja Parthasarathi Appa Row* v. *Chevendra China Sundra Ramayya* [1] in which this court laid it down that it was not open to courts to infer from the mere circumstance that rent has been paid in money for a series of years but at varying rates an agreement to pay money rent: and this dictum was approved by the Privy Council in *Parthasarathi Appa Row* v. *Chevandra Venkata Narasayya* [2]. I fail to see why the legitimacy of the inference in the question in the present case is not equally a question of law.

It has been suggested by my learned brother Krishnan, J., in consenting to the order of reference that the question is not really one of implying consideration, but of attributing a legal origin to a long continued course of payment. It is argued that this may be done by the application by analogy of the principle of presumption of a lost grant where long continued possession and enjoyment of property are proved. The same aspect of the case was suggested by Subramania Aiyar, J., in *Arumugam Chetti* v. *Raja Jagaveera Rama Venkateswara Ettappa* [3] though the learned Judge did not examine it. With all respect I do not think this is the class of cases to which the doctrine of legal origin can be safely applied if only because we know too much of the antecedent circumstances before the payment originated. The doctrine of legal origin appears to be this: that where all we know of the origin of a certain disputed right is that it has been enjoyed without interference or interruption from time immemorial, it should be presumed to have had a legal origin, if a legal origin was reasonably possible (*vide* the Lord Chancellor in *Goodman* v. *Mayor of Saltash*) [4]. Here there is no immemorial enjoyment. We know that the payment of enhanced rent originated with a certain event (the digging of a well) at a date which will in most cases be approximately ascertainable and that before that time a lower rate of rent was paid. There is neither room nor occasion for the application of the doctrine. One party sets up a particular

1. (1904) I. L. R. 27 Mad. 548.
2. (1910) I. L. R. 33 Mad. 177=20 M. L. J. 596 (P. C.)
3. (1905) I. L. R 28 Mad. 444. 4. (1882) L. R. 7 Appeal Case, 623.

F B.

Periakaruppa Mukkandan v. Raja Rajeswara Sethupathi.

Ayling, J.

explanation and the question is whether the balance of probability is so much in its favour that it should be presumed to be correct.

How carefully the doctrine of legal origin should be applied even in appropriate cases may be gauged from the judgment of the House of Lords in another case (*Gann* v. *Free Fishers of Whitslable*) 1. Their Lordships were ready to presume from a long course of payment of the anchorage fees charged that this payment had been going on from time immemorial. But they declined to infer, in the absence of evidence, the existence of the facts which alone would make a grant by the Crown legal. The Lord Chancellor said "If the payment be claimed as an ancient anchorage due, some facts must be shown which either prove or from which it can be inferred, that the soil claimed by the respondents was orginally within the precincts of a port or harbour; or that some service or aid to navigation was rendered to the public in respect of which the alleged grant was made; but nothing of the kind appears, and no such case can be presumed or inferred from the mere fact of an immemorial payment."

Lord Wensleydale expressed the same view: "I perfectly agree, that from long enjoyment of a privilege, in this case of demanding the payment of anchorage, as for a period of ninety years from 1775 to 1864, every reasonable presumption may be made that it has continued from time immemorial; but where the privilege requires more than immemorial enjoyment, in order to be legal and valid, some other facts must exist, and there must be some proof of these facts.

For the above reasons, I would answer the question referred to us in the negative.

Coutts Trotter, J.

Coutts Trotter, J.:—If the word 'enhanced' be exercised from the question referred to us, the answer presents no difficulty and could at once be given in the affirmative. A Court with nothing before it but the fact of a long continued payment by a tenant would be amply justified in presuming a legal origin for that payment. But the word 'enhanced' clearly carries an implication of a further fact, *viz.*, that the tenant had previously paid a lower rent than that sought to be enforced. And when the referring

1. (1864-5) 11 H. L. C. 193.

F. B.

Periakaruppa Mukkandan v. Raja Rajeswara Sethupathi.

Coutts Trotter.

judgments are looked into, other facts emerge that the rent in each case was enhanced when the tenant, by means of water supplies provided by himself at his own expense, changed the mode of cultivation, and that the date of enhancement of rent for this cause differs in each instance, and has not been specifically ascertained with regard to the case of any one of the appellants. In these circumstances the question appears to me to be one entirely of fact, to be determined on the balance of probabilities. For a Court to infer consideration for a long continued course of payment is a totally different thing when that is the sole fact before it, and when it is complicated by other considerations, as in this case. In the latter event it comes in effect to a balancing of probabilities ; and no Court should in my opinion presume consideration passing from the landlord, unless it thinks it inherently probable that such consideration could and did exist in fact. It is obvious that the tenants may have paid the enhanced rent merely because they were not strong enough to resist the landlord's demands, or because it had been the custom to pay it without demur and it is not contested here that custom will not do but that a contract supported by consideration moving from the landlord is required. I am conscious that the only answer I am able to give to the question propounded is not likely to be very helpful to the referring Bench: the reason in my opinion is that the question, though apparently one of law, is when analysed one of fact. The Court which has to decide the issue involved in this case should obviously pay the greatest attention to the fact of the long-continued payments of the enhanced rents by the tenants: it is no light matter to overset a state of things which has existed without question for a long period of time. But it must not assume that it is in possession of a single fact when in truth it is in possession of many, and proceed to a finding on that erroneous assumption. I think that that is what happened in this case and that the error has repeated itself in the terms of the reference.

I do not therefore feel able to say more than this : that if the continued payment of a rent were the sole fact before the Court, it would be entitled to presume consideration from it ; but that if, as in the present case, there are other facts before the Court, it must refuse to treat the payment as raising a presumption, and, while giving it such weight as it thinks fit,

P. B.

Periakaruppa Mukkandan v. Raja Rajeswara Sethupathi.

Seshagiri Aiyar, J.

perhaps a determining weight, treat it merely as a portion of the evidence in the case, subject to be weighed against and perhaps overtopped by the evidence on the other side.

Seshagiri Aiyar, J. :—It was stated by Mr. Justice Ayling in the course of the hearing of the Full Bench Reference that it was not suggested before the Division Bench that there was or might have been an original contract between the landlord and the tenant to the effect that in case the tenant cultivated garden crops on dry lands from whatever irrigation source it might be, he should pay a different rate of rent different from what he was bound to pay for raising dry crops. It may be open to the Division Bench when the case goes back to permit the landlord to prove such an agreement. They would be guided by the nature of the pleadings, the issues and the opportunities which the parties had to present their case. But apparently until Mr. K. Srinivasa Aiyangar opened the case in this Court, this suggestion was not put forward. The learned Vakil has apparently based his contention upon the statement of Lord Sumner in *Raja Jagaveera Rama Venkataswara Ettappa* v. *Alawarasa Asari* [1], to the following effect at p. 736. "It never appears to have been suggested that what was meant was a custom of the country, with reference to which the ryots or their predecessors must be deemed to have contracted when they began to occupy the land in the first instance, or that the Zemindar's claim was merely to have the original contract applied to new circumstances according to its terms, and was not a claim to alter those terms, to imply a new contract for that purpose." No doubt, if that was the contention and if the question referred to us is to be regarded as relating to that argument, I would be prepared to answer the question by saying that the trial court or the lower appellate court would not be acting contrary to law or to any usage having the force of law " in infering consideration for a long-continued course of payment."

I do not think that *Goodman* v. *Mayor of Saltash* [2] relied on by Mr. K. Srinivasa Aiyangar would compel us or the Division Bench to draw such an inference otherwise. Lord Selbourne at the bottom of page 739 says, "But an open

1. (1918) 45 I. A. 195=36 M. L. J. 49=(1918) M. W. N. 782.
2. (1882) 7 Appeal cases 633.

F. B.

Periakaruppa Mukkandan v. Raja Rajeswara Sethupathi.

Seshagiri Aiyar, J.

and uninterrupted enjoyment from time immemorial under a claim of right seems to me to be all that is necessary for a presumption that it had such an origin as would establish the right, *if a lawful origin was reasonably possible in law.*" I understand the Lord Chancellor to have held that the continuance of an arrangement for however long a period is not evidence that the contract is lawful or supported by consideration. It would only enable the Court to infer that the parties had come to such an arrangement. The Indian Contract Act speaks of agreements or contracts which are void for "want of consideration," Therefore, the element of consideration is not an implication which is involved in the inference which attributes a lawful origin for the prevalent practice. Courts in this country are familiar with cases where notwithstanding long payment, the landlord has not been permitted to enforce these payments. In *Ramasami* v. *Appavu* [1], it was found that the inhabitants of a village contributed to a temple a quantity of grain proportionate to the holding of each ryot. It was held that this was a voluntary one and had no consideration to make it legally enforceable. I can quote a large number of similar instances in Madras and Calcutta. I refer to them to show that a long course of payments standing by itself, although it may refer the payment to a voluntary agreement between the parties, would not suffice to indicate that the agreement was either lawful, reasonable, or had consideration. I am willing to agree that the payment for a long period standing by itself is an element to be taken into account in deciding whether there was consideration for it or not.

But that is not what we are asked to give our opinion upon. It was explained by Mr. Justice Ayling that he and Mr. Justice Krishnan used the word *enhancement* in the question under reference as it was not disputed before them that there was a prior rate of rent which was enhanced after improvements were effected by the tenant. In this view, I am unable to hold that a course of payment would lead to the presumption that there was consideration for the increased payment. Given these facts, namely, (*a*) an existing contract to pay at a particular rate, (*b*) the ryot solely and at his expense effected improvements on the land by digging a well in it, (*c*) and the increased payment

1. (1887) I. L. R. 12 Mad. 9.

F. B.

Periakaruppa Mukkandan v. Raja Rajeswara Sethupathi.

Seshagiri Aiyar, J.

commenced after these operations by the ryot, I can find no circumstances for the operation of any presumption. *Consideration*, which has an extended significance in the Indian Law, pre-supposes that something moves from the promisee. But when we know that he has not moved his little finger except it be to extend it to receive the additional payment, there is no room for making a presumption. If I understand the judgment of Lord Sumner rightly, that is what the learned Lord has laid down. His Lordship says at page 737 of the judgment quoted above, " What is this consideration to be ? The mere letting of the land by the landlord will not do, for it was let at the dry rate already, and the ryot was entitled to continue in occupation at that rate, and no fresh consideration therefore moved from the landlord for the ryot's assumed promise to pay at the 8 fanom rate. The District Judge appears to have found consideration in the landlord's abstention from exercising his right to resort to the 'warum' system, if the ryot refused to consent to pay at the rate of 8 fanoms, but, under the Act, if there was an implied contract for the 4 fanom rate, that contract had to be enforced, and there was no question of resorting to the 'warum' system. By the admissions, such an implied contract did exist." If the letting was previous and if there can be no question of going back to waram payment, because that can only be done if there was no express or implied contract, if there was a specified rate before the improvements, and if the ryot did not cultivate the new crop with the aid of water from the landlord's sources of irrigation, there can be but one answer to the question whether the new rate had consideration. It was faintly suggested and I find that in some of the cases this is accepted, that the landlord might have given up his claim for rent upon that portion of the holding on which the well was dug, and that forbearance might have been the consideration for the extra payment. In the first place, this is a fact to be proved and not a matter depending upon the course of payments. In the second place, it is not ordinarily the case that the landlord excludes this portion from the payment of the rent. In the third place, even if the landlord consented to the exclusion, it very often will be because instead of a precarious payment from the tenant dependent upon rain-supply, for the crops, he would have calculated that a good

F. B.

Periakaruppa Mukkandan v Raja Rajeswara Sethupathi.

Seshagiri Aiyar, J.

irrigation source would ensure a regular payment of the original rent; because it has been held that if the tenant is unable to cultivate owing to want of water, he is not ordinarily chargeable with rent, unless there is a contract to the contrary. Moreover, I very respectfully adopt the observation of Lord Sumner that it would not be easy "to say the least of it to suppose that any ryot voluntarily agreed to have his rent enhanced whenever his own outlay should have rendered an improved mode of cultivation." From my experience of the country, what happens is the tenant when in a prosperous condition owing to his own exertions, does not grudge to pay the landlord a share of the benefits which he is reaping. This is not the only country in which landlords lay claim to unearned increments, but I am unable to hold from the naked circumstance of payment alone that there must have been consideration from the start.

As regards cases, my view is supported by *Arumugam Chetty* v. *Rajah Jagaveera Rama Venkateswara Ettappa* [1], *Arumugam Chetty* v. *Raja Jagaveera Rama Venkateswara Ettappa* [2] and the recent Privy Council decision. The earlier decisions of this Court which Lord Sumner quotes without disapproval, in *Venkatagiri Raja* v. *Pitchana* [3] and in *Fischer* v. *Kamakshi Pillai* [4] though they were based on custom, lay down the law in the same way. In *Gopalaswami Chettiar* v. *Fischer* [5] there is some doubt thrown on *Fischer* v. *Kamakshi Pillai* [4], but having regard to its quotation by the Judicial Committee, I do not attach much importance to the doubt. In *Suppa Pillai* v. *Nagayasami Thumbichi Naicker* [6] to which the present Chief Justice was a party, it was found that the commutation of waram into money was a sufficient consideration for the new payment. The price of paddy is dependent on current prices and when a fixed payment is agreed to, there is sufficient consideration for what may at first sight, appear to be excess rate. I do not think that *Parthasarathi Appa Rau* v. *Chevandra Venkata Narasayya* [7] has any bearing on the present question. In the other cases cited, including the one to which I was a party, it was held without discussion that payments during a particular period would, or would not

1. (1905) I. L. R. 28 Mad. 444.
2. (1910, I. L. R. 35 Mad. 134.
3. (1885) I. L. R. 9 Mad. 27.
4. (1897) I. L R. 21 Mad. 136.
5. (1904) I. L. R. 28 Mad. 323.
6. (1907) I, L. R. 31 Mad. 19.
7. (1910) I. L. R. 33 Mad. 177.

F. B.

Periakaruppa Mukkandan v. Raja Rajeswara Sethupathi

Seshagiri Aiyar, J.

be evidence of consideration. These decisions ought not to be regarded as authoritative pronouncements on matters which were not discussed and decided upon.

For all these reasons, my answer is that a course of payment, if nothing else appears, may be an element to be considered in arriving at the conclusion whether there was consideration for it or not; but if there was a fixed payment before and the rate was enhanced slowly because the tenant has cultivated new crops by his own exertions, my answer is that there is no room for presuming consideration under such circumstances.

Kumaraswami Sastri, J.

Kumaraswami Sastri, J.—The question referred to the Full Bench is whether the Court can infer consideration solely from a long continued course of payment of enhanced rent in cases where it is sought to base liability to pay enhanced rent on an alleged contract to pay it. The facts of the case and the findings of both the lower Courts have been set out in the order of reference and it is not necessary for me to repeat them here.

I am of opinion that it is open to the Court from a long and uniform course of payment to presume that there was an agreement to pay which had a lawful origin and was supported by consideration where it is satisfied that it would be unreasonable from lapse of time or other circumstances to call upon the landlord to give direct evidence as to the terms and circumstances that gave rise to the payment, and when circumstances exist which would render the drawing of the presumption reasonable in law and probable in fact. If all that appears is a long course of payment, I do not see why the presumption should not be drawn.

It seems to me that the drawing of the presumption is only an application of the principle that a legal origin should be presumed where there has been a long-continued assertion of a right if such a legal origin were possible and that in such cases courts will presume that those acts were done and those circumstances existed which were necessary to the creation of a valid title (see the judgment of Lord Hershell in *Phillips* v. *Halliday* [1].) The presumption of a lost grant in cases of long-continued exercise of rights has been recognised in the leading

1. (1891) Appeal Cases. 228.

F. B.

Periakaruppa Mukkandan v. Raja Rajeswara Sethupathi.

Kumaraswami Sastri, J.

case of *Goodman* v. *Saltash Corporation* [1] and the principles governing such cases have been laid down in a series of English decisions. As pointed out by Farwell, J., in *Mercer* v. *Dennie* [2] not only would Courts be slow to draw an inference of fact which would defeat a right which has been exercised for a very long period unless such an inference is irresistible, but will presume everything that is reasonably possible to presume in favour of such a right. In *Foley's Charity Trustees* v. *Dudley Corporation* [3], where a free farm rent had been paid to certain charity trustees for over 100 years in respect of a piece of land acquired for the widening of a road it was held that the Court ought to presume that land had been granted to the turnpike trustees as land subject to a perpetual rent charge even though no conveyance to the trustees was forthcoming. The Master of the Rolls observed that he did not think it necessary to enlarge upon the duty of the Court to make every presumption in a case like that which can be made to support such a long-continued possession.

There seems to me to be nothing in the relations between landlords and tenants in this country to render it necessary or equitable to exclude the principle so clearly enunciated in the English cases though the presumption has to be applied with great care and discrimination in cases of ryots in Zemindaris and a great many circumstances have to be noted and their probability excluded before the Court can proceed to draw the inference that what was being done had its origin in an agreement supported by consideration. For example Courts have to take into careful consideration the fact that very often a tenant pays enhanced rent demanded not because there are any valid grounds for doing so but because he sees his neighbours paying it without demur. The ignorance of ryots of their legal rights and the position and influence of the Zemindar have to be taken into account. The difficulties often experienced and the caution required in dealing with cases of claims based on an enhancement of rent are however no ground for not applying a principle which had so such reason and authority to support it.

Enhancement of rent may have been due to various causes and the enhanced rent may have been paid for so long a series

1. (1882) 7 Appeal Cases 633. 2. (1904) 2 Ch. 534 at 556.
3. (1910) I K. B. 317.

F. B.

Periakaruppa Mukkandan v. Raja Rajeswara Sethupathi.

Kumaraswami Sastri, J.

of years that it would be unreasonable to expect the landlord to prove the grounds which led to the enhancement and the consideration therefor. When no circumstances exist which would raise a fair inference that rent was enhanced without any consideration moving from the landlord the ordinary presumption that a person and his predecessor-in-title would not have paid for a series of years, more than what was payable, voluntarily and withont any legal or binding obligation to do so, might well be raised.

The balance of authority is in favour of the view that a legal origin may be presumed. In *Venkatagopal* v. *Rangappa,* [1] Turner, C. J., observed : "Payment of rent in a particular form or at a certain rate for a number of years is not only presumptive evidence of the existence of a contract to pay a rent in that form or at that rate for those years, but is also presumptive evidence that the parties have agreed that it is obligatory on the one party to pay and the other to receive rent in that form or at that rate so long as the relations of landlord and tenant may continue. Either party is of course at liberty to rebut the presumption."

In *Krishna* v. *Venkataswami* [2] it was held following the above decision that an implied contract to pay rent at waram rates within the meaning of Section 11 of the Rent Recovery Act may be inferred where a landlord accepted rent at waram rates for a number of years.

In *Arumuga Chetti* v. *Raja Jagaveera Rama Venkateswara Ettappa* [3], Subramania Aiyar, J., in dealing with presumptions to be raised for a long course of payment observed "If in cases like the present payment at the higher rate had continued to be made for a great many years so as to make it unfair to the landholder on account of such lapse of time to be compelled to prove the existence of some consideration when the payment commenced it may be a question whether the Courts should not presume a lawful origin for the payment on the analogy of the lost grant principle availed of to support long possession and enjoyment. That even in the case of immemorial usage the doctrine of *quid pro quo* is not altogether to be ignored will be seen from the observations of Lord Chelmsford in

1. (1882) I. L. R. 7 Mad. 365. 2. (1883) I. L. R 8 Mad. 164.
3 (1905) I. L. R. 28 Mad 444, 451.

F. B.

Periakaruppa Mukkandan v. Raja Rajeswara Sethupathi.

Kumaraswami Sastri, J.

Gann v. *Free Fisheries of Whitstable* [1]. He did not pursue the argument further as he was of opinion that the facts proved in the case he was dealing with gave no room for any such inference.

In *Venkata Perumal Raja* v. *Ramudu* [2], Sadasiva Aiyar and Napier, JJ., held that the Court can presume a lawful origin for a contract to pay enhanced rent where it has been paid for a long time though they differed as to whether the provisions of S. 13 of the Estates Land Act were retrospective. In *Prayagdosjee Varu* v. *Venkama Naidu*,[3] Sadasiva Aiyar and Bakewell, JJ. held that an implied contract to pay an enhanced rent may be presumed from continued payment for a number of years. In *Lodd Govindoss* v. *Chennappa Naidu* [4], Sadasiva Aiyar and Napier, JJ., followed their decisions in *Venkata Perumal Raja* v. *Ramudu* [2], as to the power of the Court to presume a valid contract to pay enhanced rates.

In *Devaru* v. *Raghunatha Rao* [5], Sundara Aiyar and Sadasiva Aiyar, JJ., were inclined to the view that Courts may presume that there was some reason which made it obligatory on the payee to make the payment when periodical payments were made for a long time though they pointed out that much caution was required in the application of this principle when cesses were concerned.

In Second Appeals Nos. 1639 to 1644 of 1916, Spencer and Krishnan, JJ., were of opinion that payments for a sufficiently long period would entitle the Court to raise a presumption that they are based on an agreement between the parties and that there must have been some consideration for that agreement.

A contrary view was taken in *Arunachalam Chetty* v. *Syed Ahmed : Ambalam* [6], where Ayling and Phillips, JJ., were of opinion that though an agreement to pay enhanced rent may be inferred from payment for a long series of years yet independent proof of consideration was necessary to render it a binding contract. With all respect I fail to see why if circumstances exist for drawing the presumption that there was an agreement they should not equally be used to draw a presumption that there was consideration. As observed by Ayling, J., in

1. (1864-65) 11 H. L. 192 at page 193.
2. (1915) I. L. R. 39, Mad. 84.
3. (1918) 7 L. W. 477
4. (1914) 28 M. L. J. 136.
5. (1913) M. W. N. 886.
6. (1915) 2 L. W. 1117.

F. B.

Periakaruppa Mukkandan v. Raja Rajeswara Sethupathi.

Kumaraswami Sastri, J.

Arumugam Chetty v. *Raja Jagaveera Rama Venkateswara Ettappa* [1], consideration may be of the same implied nature as the contract to pay. In *Prayagdossjee Varu* v. *Venkama Naidu* [2], Sadasiva Aiyar and Bakewell, JJ., dissented from the decision in *Arunachalam Chetty* v. *Syed Ahmed Ambalam* [3] and I entirely agree with the reasons given by them.

In *Narasimmulu Nayudu* v. *Ramesam*[4] and *Raja Parthasarathi Appa Rao* v. *Chevendra Chinna Sundra Ramayya* [5], it was assumed that it was open to the Courts to draw the inference that there was a valid and enforceable agreement from long course of payment though on the facts of those cases it was held that period was not long enough.

It was argued by the Vakil for the appellant that in cases of permanent tenancy there is an express contract at the time of letting and that there consequently arises no room for presuming any implied contract with a fresh consideration and great reliance has been placed on the decision of their Lordships of the Privy Council in *Raja Jaga Veera* v. *Alavarasa Asari* [6]. I do not think the decision is authority for this proposition. All that was decided was that the expression 'implied contract' was an English term of art " involving the legal incident of some consideration moving from the landlord as that incident is understood in English Law." On the facts found in the cases before their Lordships (namely that enhanced rent was claimed soley because tenants dug wells at their own expense) it was held that there was no room for presuming any implied contract. The question as to the presumption of a lost pattah or lost proof of consideration was considered and the observations of Lord Sumner at the end of the judgment leaves the question open.

I am unable to see why a legal origin should not be presumed in cases where rent has at some remote period been enhanced. Enhancement of rents in the case of wet or garden crops raised on dry land may be due to various causes some of which would not necessarily negative the idea of fresh consideration and some of which would ex-hypothesi do so. Where it is possible to infer a legal origin from a long course of payment I do not see why the necessary presumption should not be

1. (1910) I. L. R 35 Mad. 134.
2. (1918) 7 L. W. 477
3. (1915) 2 L. W. 1117.
4. (1891) I. L R. 14 Mad. 44.
5. (1904) I. L. R. 27 Mad. 543.
6. (1918) M. W. N. page 732=36 M. L. J. 49

F. B.

Periakaruppa Mukkandan v. Raja Rajeswara Sethupathi.

Kumaraswami Sastri, J.,

made. Like all presumptions their strength or weakness will depend upon the facts of the case to which they are to be applied.

There may be as pointed out in *Venkatagiri Raja* v. *Pichana* [1], cases where the land has not been classified as wet or dry or garden but the rent varied with the crops and where the fiscal accounts were prepared on this principle. In such cases the landlord will be entitled to enhance the rent if garden crops are raised irrespective of whether the crops are raised with water from wells dug by the tenant or not. There may be cases where the tenant dug wells or tanks with the help of the landlord and where the landlord gave poromboke lands for the purpose. In such cases there is nothing to prevent the parties from agreeing to pay enhanced rent. (See *Govinddoss* v. *Chennappa Naidu* [2]). There may be cases where rent at a certain rate appears to have been paid at some remote period and enhanced subsequently the reason not being apparent on the evidence. In such cases there is nothing to militate against the presumption of lawful origin for the enhancement being drawn. On the other hand where there is nothing to show that there was any agreement that the rates should vary with the crops and where all the facts point to a fixed rent having been agreed upon at the time of the letting it is clear that an enhancement cannot be claimed *merely because* the tenant raised garden crops with the aid of water from wells dug at his expense or water which was not the landlord's. There is obviously no consideration in such cases and no room for the drawing of any presumption because of certain known facts which exclude the possibility of any consideration. See *Venkatagiri Raja* v. *Pichana* [1]. *Raja Venkata Narasimha* v. *Venkayya* [3], *Arumugam Chetti* v. *Raja Jagaveera Rama* [4], *Seetaram Raju Singam Raju* v. *Raja Venkatagiri Appa Row* [5], *Kasidoss Subraya* v. *Narayana Reddi* [6], and *Srimantu Raja Mallikarjuna Prasad Naidu* v. *Subbayya* [7].

The cases above referred to which decide that no consideration can be inferred merely by payment for a series of years where the only ground shown is the improvements of the

1. (1885) I. L. R 9 Mad. 27.
2. (1914) 28 M. L. J. 136.
3. (1914) I L. W. 576.
4. (1910) I. L. R. 35 Mad. 134.
5. (1913) M. W. N. 645.
6. (1915) M. W. N. 209.
7. (1911) I. L R. 36 Mad. 4.

F. B.

Periakaruppa Mukkandan v. Raja Rajeswara Sethupathi.

Kumara swami Sastri, J.

land *at the tenant's sole expense* do not militate against the general proposition that the Court can infer a lawful origin where a long course of conduct is proved. They only illustrate the limitation that such an inference cannot be drawn where the facts proved show that there cannot be any consideration for the enhanced payment. The rule as to the presumption of a legal origin from long course of conduct is always subject to the inference being *legally possible*. As the reference to us is general and is not limited to enhancement of rent owing to any particular reason I would answer the reference as proposed by me in the opening of my judgment.

A. V. V.

PRIVY COUNCIL

PRESENT :—LORD BUCKMASTER, LORD DUNEDIN, AND SIR JOHN EDGE.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Maharajah Ram Narayan Singh ... *Appellant* *

v.

Ram Saran Lal and Others ... *Respondents.*

P. C.

Ram Narayan Singh v. Ram Saran Lal.

Jagirs, grant of—Prima facie *are for life only—But may be in such terms as to make the jagir hereditary—Estate of inheritance must be granted in unambiguous terms—Putrapoutradi, its meaning—does not necessarily import an estate of inheritance descending to collaterals.*

A jagir must be taken *prima facie* to be an estate only for life. It may be granted in such terms as to make it hereditary but the terms must be unambiguous and must clearly show whether it was the grantor's intention that the right of inheritance should be general or should be confined to particular heirs.

The words *putrapoutradi* in the grant of a jagir at all events outside Bengal—do not necessarily import an estate of inheritance descending to collaterals.

Ram Lal Mukherjee v. *Secretary of State for India in Council* [1] and *Lolit Mohun Singh Roy* v. *Chukkan Lal Roy* [2] distinguished.

Appeal from a decree of the Calcutta High Court (Stephens and Mullick, JJ.,) reversing a decree of the Subordinate Judge of Hazaribagh.

The facts of the case are sufficiently stated in their Lordships' judgment and in the report of the proceedings in the Calcutta High Court at 42 Cal. 305. The learned Judges of the High Court considered that the Privy Council had laid down a general rule that the words "putrapoutradi" imply "an absolute and heritable estate, and pass an estate of inheritance": they held therefore that the original grantee took an absolute heritable and alienable

* 3rd December, 1918. P. C. Appeal No. 113 of 1916.

1 (1881) L. R. 8 I. A. 46=I L. R. 7 Cal. 304.

2. (1897) L. R. 24 I. A. 76=I. L. R. 24 Cal. 834.

P. C.

Ram Narayan Singh v. Ram Saran Lal.

estate, which all his heirs were capable of inheriting: reversed the decree of the Subordinate Judge, and dismissed the Plaintiff-Appellants suit to resume the jagir on failure of lineal heirs of the grantee.

Dunne, K. C. and *C., M. Picciotto*, for appellant, submitted that both Courts had found that there was proved a custom entitling the holder of the Ramgarh Raj to resume jagirs within that Raj on failure of lineal heirs of the grantee. The High Court have overridden this custom on account of the words putra poutradi, which have been construed in a will as passing an heritable estate. It is a fallacy to apply such an analogy of construction to the grant of a jagir.

The grant of a jagir, however wide the terms, imports *prima facie* a life estate only. S. 15 of Bengal Regulation 37 of 1793 lays down that "jagirs are to be considered as life tenures only". This Board has laid down that a jagir must be taken *prima facie* to be an estate for life, although it may possibly be granted in such terms as to make it hereditary. *Gulabdas Jagijvandas* v. *Collector of Surat.* [1]

(*Sir John Edge* : The Common Law is that a jagir is for life.)

As to the custom which has been found to exist in this Raj vide Vol. 16 of Hunter's Statistical Account of Bengal, pp. 18-21, 117, 121, etc, such a custom may control and limit even the words of the instrument granting a jagir: *Perkash Lal* v. *Rameshver Nath Singh* [2].

J. M. Parikh, for respondents, referred to the definition of "Jagir" in Wilson's Glossary, and submitted that the decisions as to the resumption of jagirs were in cases of grants by one private person to another private person. With regard to them, no doubt, there was a custom of resumption on the death of the jagirdar whithout lineal descendants : *Rup Nath Kunwar* v. *Jagannath Sahai.* [3]

The Raja here was in the position of a ruling prince.

(*Lord Dunedin* : Hunter at page 122 deals with the case of this very Raja).

The grant here is a written one, and no oral evidence whether of custom or otherwise is admissible in construing its terms.

The terms themselves are clear. The words *putra poutradi* are general : they include not only sons and grandsons, but others also. As far back as the *Tagore case* it was laid down that a gift to a man and his sons and grandsons would in the absence of anything

1. (1878) I.L.R. 3 Bom. 186=L.R 6 I.A. 54. 2. (1904) I. L. R. 31 Cal. 561.
3. (1886) 6 Sel. Rep. S D. A 158, 160.

P.C.

Ram Narayan Singh v. Ram Saran Lal

showing a contrary intention, pass a general estate of inheritance according to Hindu Law. *Gnanendra Mohan Tagore* v. *Upendar Mohan Tagore* [1].

This rule has more than once been followed by the Board: *Bhuban Mohan Debi* v. *Huris Chander Chowdhry* [2], *Lolit Mohan Singh Roy* v. *Chukkun Lal Roy* [3].

The mere use in the grant of the word jagir does not bring in all the technical incidents of real jagirs. Jagirs proper are the subject of special rules: Mayne's Hindu Law, para. 398 (8th. Edition, page 543). Even in the case of jagirs proper a grant to a man and his heirs gives an absolute interest *Dosibai* v. *Ishvardas Jagajivandas* [4].

(*Lord Buckmaster*:—Every case you have cited except that is a will case.)

Dunne in reply: *Dosibai* v. *Ishwardas Jagjivandas* [4] is distinguishable: the word "heirs" was used, and moreover there was no question of custom.

This is a case of one of several thousand jagirs, all granted in different terms, as to which there are concurrent findings that there is a custom that they only go to lineal descendants.

(*Sir John Edge*:—Does not the evidence come to this, that there is no instance of a jagir in Orissa going to collaterals. I think the High Court would have affirmed the Subordinate Judge but for the two Privy Council rulings.)

Their Lordships' Judgment was delivered (December 3, 1918) by

Sir John Edge.

Sir John Edge:—This is an appeal from a decree, dated the 16th June, 1914, of the High Court at Calcutta, which set aside a decree of the Subordinate Judge of Hazaribagh, dated the 12th August, 1910, and dismissed the suit.

The suit in which this appeal was brought was commenced by Maharaja Sri Sri Ram Narayan on the 4th February, 1909, for Khas possession of Mouzah Salga in Raj Ramgarh in Chota Nagpur and for mesne profits. Mouzah Salga had been granted as jagir in 1852 to Kanai Singh by Maharaja Sambunath, ancestor of the plaintiff, who was the Zamindar, then possessed of the Mouzah. The original plaintiff has died and the appellant is his legal representative.

1. (1869) 4 Beng. L. R. 103 at p-182. 2. (1878) L. R. 5 I. A. 138.
3. (1897) L. R. 24 I. A. 76,83
4. (1891) I L. R. 15 Bom. 222=L. R. 18 I. A. 22.

P. C.

Ram Narayan Singh v. Ram Saran Lal.

Sir John Edge

The grant of the jagir as translated is as follows :—

3rd Falgun. Sudi 1903 Sambat.

Pottah of agreement granted by order of His Highness Maharaja Sri Sri Sambhu Nath Bahadur is as follows :—

The jagir of Salga, one village, in pergunnah Karanpura is granted to Kanai Singh, of which the jumma is Co's Rs. 300. Out of that, the landlord's 6 annas share is Rs. 112-8 from which a remission of Rs. 75 is made, the balance of landlords' share Rs. 37-8, shall be paid by you year by year You, with your descendants, will continue to enjoy the same. The village is granted together with trees wells, tinils, fish. This is granted by His Highness in the presence of Bakshi Joyanandan Das, Bakshi Lachman Das, Mahta Bissambhar Das, Bakshi Bhawani Ram, Bakshi Bhawani Ram (*sic*) and Bakshi Bhagwan Das.

The vernacular word in the grant which has been translated as "descendants" is *putrapoutradi* ; which, according to the plaintiff's case, meant in the grant male descendants in the male line. Kanai Singh died before suit, having had a son Sewbux, who predeceased him, and had died without issue, and one other son Bansi Lal, who survived him and died without issue before suit. The defendants are Ram Saran Lal, and his minor sons, and Shib Saran Lal and his minor sons. The defendants are not descended from Kanai Singh, the grantee, they are descended in the male line from Pyary Lal, who was a brother of Kanai Singh. The plaintiff's case was that on the death of Bansi Lal without male issue surviving him, Mouzah Salga reverted to him, he being the legal representative of the grantor. The defendants put forward two different cases in defence to the suit, the first of which was that the jagir had been originally granted to Raghu Singh, who was the father of Pyary Lal and Kanai Singh, and that as they are the male descendants in the male line of Raghu Singh the mouzah had not reverted and they are entitled to the possession of it under the grant alleged by them. The defendants failed to prove that the grant of the jagir had been made to Raghu Singh and not as the fact was to his son Kanai Singh. It may be observed that in setting up that defence the descendants were obviously adopting the plaintiff's construction of the vernacular word *putrapoutradi*, according to which it meant in the grant of a jagir in Raj Ramgarh, male descendants in the male line. Having failed to prove that the original grant was made to their ancestor Raghu Singh the defendants then contended that the grant to Kanai Singh and his *putrapoutradi* created an estate of inheritance which descended to them as collaterals.

The Subordinate Judge considered that a grant of a jagir to a man and his *putrapoutradi* was a grant to him and his

P. C.

Ram Narayan Singh v. Ram Saran Lal.

Sir John Edge.

lineal male descendants, and that in Chota Nagpur the term *putrapoutradi* could not in a grant of a jagir possibly include collateral or female heirs. A great deal of evidence, documentary and oral, was before the Subordinate Judge as to grants of jagirs which had been made in Raj Ramgarh, and that evidence satisfied the Subordinate Judge that all jagirs granted in Raj Ramgarh were resumable on failure of male heirs in the male line of the original grantees. The Subordinate Judge in his judgment said :—

"I have before stated that in 31 Calcutta, page 561 'Alwal jagirs' which is a term of much broader significance than 'putputradi jagir' were held to be resumable on proof of a custom that jagirs generally were resumable on failure of male issue. Also looking to 'Hunter' there can not be any doubt that jagirs of all sorts, without any exception, were resumable. The language of the Sanad is ambiguous, the word" putraputradi does not clearly mean an absolute estate of inheritance, and jagirs generally are proved, both by oral and documentary evidence, to be resumable. No instances of 'putraputradi jagir' not being resumed and that females and collateral heirs are still holding them. It is for the defendants, therefore, to prove the exception in the case of jagirs containing word 'putputradi. Nothing has been done in this connection. It is not established that Ramgarh Raj used to grant both two distinct sorts of jagirs—one resumable on failure of male issue and another absolute estate of inheritance not resumable with word 'putputradi' containing in Sanad. On the contrary the evidence is that all jagirs, by whatever name called condition or no condition attached were primarily life-tenures and which by efflux of time became permanent and resumable and liable to resumption only on failure of male heirs of the original grantees. In the face of the strong documentary evidence of the custom alleged by the plaintiff it is needless to comment at length on the oral evidence that was also given to prove custom. The Raja's old servants all deposed to the existence of the custom and they stated specific cases of the resumption of some jagir villages that were within their knowledge and time, in addition to the cases to which the judgments filed relate. The case reported in 31 Cal. is also a case of Chota Nagpur and is a much stronger case than the present. Thus the custom being fully established, all the ambiguity in the word 'putputradi' is removed and it must be taken to mean lineal male descendants only."

The case in I. L. R. 31 Cal. 561, to which the Subordinate Judge referred was that of *Perkash Lal* v. *Rameshwar Nath Singh.* In that case a proprietor of a Chota Nagpur Raj in a deed of gift had granted to a Brahmin and his *alaulat* a Mouzah in pergunnah Kanda, and it was held by the High Court at Calcutta that although the words *alaulat* etymologically includes female as well as male descendants, yet according to a custom which was proved to have prevailed at the time of the grant and subsequently in that part of the coun-

P. C.
Ram Narayan Singh v. Ram Saran Lal.
Sir John Edge.

try, the words *alaulat* must be interpreted to mean lineal male descendants only. The learned Judges who decided that case in the High Court at Calcutta in 1904 referred in their judgment to a case in which the Deputy Commissioner of Chota Nagpur had decided in 1845 that a grant to a man and his *putrapoutradi* did not convey an estate of inheritance, and that the grantor was entitled to resume the lands granted on the death without issue of the grantee. The reference in the Subordinate Judge's judgment to " Hunter" was without doubt a reference to Sir William Hunter's statistical account of the districts of Hazaribagh and Lohardaga, which was printed in 1877. When he wrote that account he was Mr. W. W. Hunter, Director-General in India of Statistics, and at pages 121 and 122 of that work he gave a historical account of jagirs in Ramgarh. The Subordinate Judge gave to the plaintiff a decree for possession and for mesne profits to be subsequently ascertained. From that decree the defendants appealed to the High Court at Calcutta.

The learned Judges of the High Court who heard the appeal as to the evidence said " There is evidence which may be summarised by saying that it shows that jagirs granted by the Raj were terminable on the death of male heirs, though there is no case to show that this was so when the words 'putrapoutradi' were used." They rightly held that the grant of a jagir without any words to show that it was not for life only would be a grant only for the life of the grantee, but they considered that the addition of *putrapoutradi* extended the estate for life. They said: "The words literally translated are, as we understand putra=son, poutra=grandson, and adi=others, but the expression must, of course, be construed in the first place, according to any construction that has been legally recognised." As the Board had decided in *Ram Lal Mookerjee* v. *The Secretary of State for India in Council* [1] that the words *putrapoutradi krame*, which occurred in a devise in a Bengali will though importing the male sex in their primary signification, apply also to the female heirs of a female where by law the estate would descend to such heirs, and were apt words for conferring an estate of inheritance upon either male or female, the learned Judges of the High Court considered that the term *putrapoutradi* in this jaghir grant

1. (1881) L. R. 8 I. A. 46.

P. C.

Ram Narayan Singh v. Ram Saran Lal.

Sir John Edge.

must be construed as conveying an estate of inheritance which would descend to collaterals of the grantee. They also referred to another decision of the Board in *Lalit Mohun Singh Roy* v. *Chakkun Lal Roy* 1, which also was a case of a devise in a Bengali will and they allowed the appeal and dismissed the suit. From that decree of the High Court this appeal has been brought.

There can be no doubt that a jagir must be taken *prima facie* to be an estate only for life, although it may possibly be granted in such terms as to make it hereditary. That was so decided by the Board in *Gulabdas Jugjivandas* v. *Collector of Surat* 2, which was an appeal from the High Court at Bombay. But the terms which will make the grant of a jaghir a grant of an estate of inheritance must, if they are to be considered alone, the terms which are not ambiguous and must clearly show whether it was intended by the grantor that the right of inheritance should be general or should be confined to a particular class of heirs. In *Dosibai* v. *Ishwardas* 3, there was no ambiguity in the terms of the grant. In that case the Governor of Bombay in Council by a Sanad in English, which was not ambiguous, had granted to Ardeser Bahadur "and his heirs for ever as jaghir" four villages, and the Board held that "where there is a grant to a man and his heirs, and nothing to control the ordinary meaning of the words, the grantee takes an absolute interest." In this case, now before this Board, the term *putrapoutradi* standing by itself, and without any evidence to show whether in Raj Ramgarh collaterals or females succeeded to Jaghirs, is ambiguous. But the evidence shows that in Raj Ramgarh those who have succeeded to Jaghirs have been always males in the male line of the grantee.

The cases of *Ram Lal Mookerjee* v. *The Secretary of State for India in Council* 4 and *Gulabdas Jugjivandas* v. *Collector of Surat*2 were not cases of grants of jaghirs; they were cases of the construction of vernacular words in devises in Bengali wills, and it was obvious that the testators in employing terms which usually in Bengal were understood as apt to pass an estate of inheritance did employ them to pass such an estate. It may well be that in a grant of a jaghir in Bengal by a Bengali similar words in the grant would imply that an estate of inheritance had been

1. (1898) L. R. 24 I. A. 76
2. (1878) L. R. 6 I. A. 54.
3. (1891) L. R 18 I. A. 22.
4. (1881) L. R. 8 I. A. 46.

P. C.
Ram Narayan Singh v. Ram Saran Lal.
Sir John Edge

granted to the grantee if there was nothing to show a contrary intention. But there is nothing here to prove or even to suggest that the term *putrapoutradi* has ever been understood in Chota Nagpur or in Raj Ramgarh as including heirs collateral, and there is no evidence that any one of the many jaghirs which have been granted in Raj Ramgarh has ever descended to a collateral heir of the grantee. So much impressed was the Subordinate Judge by evidence, documentary and oral, that he came to the conclusion that there is a custom in Raj Ramgarh that jaghirs are resumable on a failure of heirs male in the male line of the grantee.

In their Lordships' opinion the Subordinate Judge was justified in making the decree which he made in this case, and it should not have been set aside. They will accordingly humbly advise His Majesty that the decree of the High Court should be set aside with costs, and that the decree of the Subordinate Judge should be restored. The respondents must pay the costs of this appeal.

Solicitor for Appellant :—*The Solicitor, The India Office.*
Solicitor for Respondents :—*T. L. Wilson & Co.*

A. P. P.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.
[FULL BENCH.]

PRESENT :—SIR JOHN WALLIS, CHIEF JUSTICE, MR. JUSTICE AYLING AND MR. JUSTICE KUMARASWAMY SASTRI.

F. B.
Kulasekara Naicker v. Jagadambal Ammal.

Kulasekara Naicker and others ... *Appellants* (Plaintiffs)*
v.
Jagadambal Ammal and others ... *Respondents (Defendants.)*

Letters Patent—Clause 15—Judgment—Order as to costs—Order passed on review of taxation by taxing officer under rules 37 and 38 of Original Side Fees Rules—Appeal.

An order as to costs is not the less a judgment within the meaning of clause 15 of the Letters Patent because it relates to costs only *Tuljaram Row* v. *Alagappa Chetiar* [1] followed.

An appeal lies from an order of the Judge passed on review of taxation by the taxing officer under rules 37 and 38 of the Original Side Fees Rules..

On appeal from the judgment of Mr. Justice Coutts Trotter dated 3rd September, 1917 in the exercise of the ordinary original civil jurisdiction of the High Court in C. S. 308 of 1916.

The Court (The Chief Justice and Napier, J.) made the following

ORDER OF REFERENCE TO A FULL BENCH :—

This is an appeal from an order of Coutts Trotter, J., passed on review of taxation by the taxing officer under rules 37 and 38 of the

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* O. S. A. No. 69 of 1917. 18th February, 1919.
1. (1910) I. L. R. 35 M. I.=21 M. L. J. 1 (F. B.)

F. B.

Kulasekara Naicker v. Jagadambal Ammal.

Original Side Fees Rules. We find some difficulty in reconciling *Saravana Mudaliar* v. *Rajagopal Chetty* [1], which decides that there is no appeal, with the principles laid down in the Full Bench Case in *Tuljaram Row* v. *Alagappa Chettiar.* [2] We accordingly refer to a Full Bench the question whether in the present case an appeal lies as from a judgment under clause 15 of the Letters Patent.

R. Subramania Aiyar, for Appellants.

A. Narasimhachariar for *V. V. Srinivasa Aiyangar,* for Respondents.

The Court expressed the following

Opinion :—Accepting the interpretation put upon the word judgment in clause 15 of the Letters Patent in *Tuljaram Row* v. *Alagappa Chettiar* [2], the most recent decision on the subject of a Full Bench of this Court, we think that an order as to costs is not the less a judgment within the meaning of clause 15 of the Letters Patent because it relates to costs only. We do not think that the observations of Sir Arnold White, Chief Justice, in the later case in *Numberumal Chettiar* v. *Krishnajee* [3], are opposed to this view. The one earlier decision of the Full Bench in *Saravana Mudaliar* v. *Rajagopal Chetty* [1], was binding on the Bench in that case and the learned Chief Justice merely distinguished it by showing that it was inapplicable to the facts of that case. We answer the question in the affirmative.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.
[FULL BENCH.]

PRESENT :— SIR JOHN WALLIS, CHIEF JUSTICE, MR. JUSTICE AYLING AND MR. JUSTICE KUMARASWAMI SASTRI.

F. B.

Padmanabha Hebbara *In re.*

Padmanabha Hebbara *In re* ... *Petitioner* (3rd accused-transferee-plaintiff.)*

Criminal Procedure Code (Act V of 1898) S. 476—Termination of judicial proceedings—Commission of offence coming to the knowledge of the court later—Whether court can pass order under S. 476.

Where the commission of an offence has been discovered by a court after the judicial proceedings have terminated, the Judge cannot pass an order under, S. 476 of the Criminal Procedure Code, although the facts of the case are fresh in his mind.

Rahimatulla Sahib v. *Emperor* [4] *and Aiyakannu Pillai* v. *Emperor* [5] followed.

Per *Kumaraswami Sastri, J.* :— It is open to the court to act in such cases under S. 195 of the Criminal Procedure Code and direct an officer to file a complaint.

Petition presented under S. 477 of the Criminal Procedure Code and Section 115 of Act V of 1908, praying the

* C. R. P. No. 150 of 1918. 17th February, 1919.

1. (1903) 17 M.L. J. 569 (F. B.)
2. (1910) I.L R. 35 Mad. 1=21 M.L.J. 1.
3. (1914) 26 M. L J. 357.
4. (1907) I.L.R. 31 Mad. 140.
5. (1908) I. L. R. 32 Mad. 49.

F. B.

Padmanabha Hebbara *In re.*

High Court to revise the order of the Court of the District Munsif of Kundapur, dated 12th November, 1917, in Disposal No. 2294 of 1917 in Small Cause Execution Petition No. 714 of 1917.

The Court (Phillips and Napier, JJ.,) made the following

ORDER OF REFERENCE TO A FULL BENCH :—

This is a petition to revise the order of the District Munsif of Kundapur directing the prosecution of the petitioner for offences under Ss. 193, 463, 466, 468 and 471 of the Indian Penal Code. The order was made under S. 476 of the Criminal Procedure Code. The offences are alleged to have been committed with reference to a decree used as genuine in Small Cause Execution Petition No. 714 of 1917 before the District Munsif which decree is found by the District Munsif in this order to be a forgery. Those proceedings had terminated on 11th September, 1917, in an order on the footing that the decree was genuine. The District Munsif states in the order under review that "within a few days of the closing of the above execution proceedings" the fact of the forgery of the decree was discovered and the present proceedings were instituted by him to ascertain if there was a *prima facie* case against the persons concerned. In the result he passed this order. It is argued before us that the proceedings having terminated he had no jurisdiction to pass the order. It has been finally decided by a Full Bench of this Court in *Aiyakannu Pillai* v. *Emperor* [1], that these orders must be passed in the course of the judicial proceeding or so shortly thereafter as to make it the continuation of the same proceeding and if this proposition was intended by the Full Bench to be of universal application, the petitioner's contention must succeed. But we have doubts whether this view is correct. The reference to the Full Bench in *Aiyakannu Pillai* v. *Emperor* [1] was whether, "on the facts stated before us, the order was made without jurisdiction." The facts were, *vide* page 50, that judgment was delivered on October 8th, that the District Judge acting *suo motu* issued notice on October 29th and that the record gave no reason for his not taking action between October 8th and October 29th. The offence came to his notice during the proceedings terminating on October 8th. In the present case no offence was brought to the notice of the District Munsif until after the proceedings terminated and the reason for not taking action before is therefore apparent. This state of facts was not therefore before the Full Bench and the actual ruling does not in terms apply, though the dicta of the learned Judges are wide enough to cover this case. The possibility of a case of necessary delay seems to have been suggested by

1. (1908) I. L. R. 32 Mad. 49.

F. B.

Padmanabha Hebbara In re.

the (present) learned Chief Justice in *Rahimadulla Sahib* v. *Emperor* 1 but he is there dealing with English practice: and the actual facts of this case were imagined by Miller, J., in *Aiyakannu Pillai* v. *Emperor* 2 and he was of opinion that an order might be passed but as he was the dissentient Judge his opinion cannot be treated as authoritative. The principle underlying the Full Bench decision not applying, we see no reason why an order under S. 476 of the Criminal Procedure Code should not be passed in these circumstances, but in view of the language of some of the Judges on the scope of the section we decide to refer to a Full Bench the following question:—"Where the commission of an offence has been discovered by a Court after the judicial proceedings have terminated but at a time when the facts were fresh in the mind of the Judge can he pass an order under S. 476 of the Criminal Procedure Code?

G. Annaji Row, for the Petitioner.

The Public Prosecutor, on behalf of the Crown.

The Court expressed the following

Wallis, C.J.

Opinions :—*The Chief Justice* :—In this case the facts first came to the notice of the Court after the judicial proceeding before it had terminated, but that I think is not enough to take the case out of the authority of the Full Bench decision of five Judges in *Aiyakannu Pillai* v. *Emperor*, 2 which confirmed the earlier ruling in *Rahimadulla Sahib* v. *Emperor* 1. I would answer the question in the negative.

Ayling, J.

Ayling, J.— If the matter were *res integra*, I should concur in the view expressed by Miller, J. in *Rahimadulla Sahib* v. *Emperor* 1, and *Aiyakannu Pillai* v. *Emperor*, 2. But, sitting as a member of the present Bench, I feel bound by the opinion of the Full Bench of five Judges in the last named case. I do not think the order in the present case can be treated as a valid one within the spirit of these rulings.

I therefore agree to the answer proposed.

Kumaraswami Sastri, J.

Kumaraswami Sastri, J. :—I agree with my Lord and would add that in cases like the present it is open to the Court to act under S. 195 of the Criminal Procedure Code and direct an officer to file a complaint.

C. A. S.

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1. (1907) I. L. R. 31 Mad. 140 at page 146.
2. (1908) I. L. R. 32 Mad. 49 at page 54.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE KUMARASWAMI SASTRI.

A. T. S Rajam Bhattar ... *Appellant* * (*Plaintiff*).

v.

Singarammal and others ... *Respondents* (*Defts. 5 to 29, 31 and 32, Party-Respondent substituted for the 33rd deft. and defts. 34 and 35.*)

Rajam Bhattar *v.* Singarammal.

Religious office—'Paricharaka'—Alienation to stranger—Validity—Public policy.

A sale of the office of Paricharaka to a stranger, where it is clear from the finding as to the duties of Paricharaka that the office is a religious one, is invalid as the alienation of religious offices is opposed to public policy.

Rajah Varmah Vallia v. *Ravi Varmah Kunhi Kutti* [1] followed

Second Appeal against the decree of the District Court of Chingleput in A. S. No. 311 of 1914, preferred against the decree of the Court of the District Munsif of Conjeevaram in O. S. No. 522 of 1910.

G. S. Venkatarama Aiyar, for Appellant.

C. Narasimhachariar, K. S. Krishnaswami Aiyangar and *T. M. Vedantam*, for Respondents.

The Court delivered the following

Judgment:—The question for decision is whether the purchase by plaintiff of the office of Paricharaka is valid. From the finding as to the duties of Paricharaka it is clear, that it is a religious office. It also appears that plaintiff is not connected with the family that held the office.

In *Rajah Varmah Vallia* v. *Ravi Varmah Kunhi Kutti* [1], the Judicial Committee expressed their opinion that a custom which allowed the sale of a trusteeship for the pecuniary advantage of the trustee would be bad in law. The trusteeship referred to in that case was the Uraima of a Malabar temple. In a prior portion of the judgment we find the following :—"The first question is whether independently of custom persons holding such a trust are capable of transferring it at their own will. No authority has been laid before their Lordships for this proposition ; principle and reason seem to be

* S. A. No. 813 of 1916. 1st August 1918.

1. (1876) I. L. R. 1 Mad. 235 at page 252

Rajam Bhattar v. Singarammal.

strongly opposed to such a power and particularly to such an exercise of it as has taken place in this case."

In *Kuppa* v. *Doraswami* [1], it was held, following the *dictum* of the Privy Council in the above case that alienation of religious trusts and offices is generally illegal, although it might be valid in exceptional circumstances such as when the transfer was to the next heir to the office. This principle was followed in *Annaswami Pillai* v. *Ramakrishna Mudaliar* [2] and in *Lakshmanaswami Naidu* v. *Rangamma* [3], it was held that the sale of a religious office was opposed to public policy, and a similar view was taken in *Sundarambal Ammal* v. *Yogavana Gurakkal* [4]. We have not been referred to any authority directly to the contrary although a custom recognising the validity of a transfer to those who by birth or marriage are entitled to hold the office was held to be reasonable in *Mahamaya Debi* v. *Haridas Haldar* [5] and in *Mancharam* v. *Pranshankar* [6], a transfer to one next in the line of succession was also held to be valid. These exceptional cases need not be considered now for the transfer in the present case was made for consideration to a stranger. In accordance with the *dictum* in *Rajah Varma Vallia* v. *Ravi Varma Kunhi Kutti* [7] which has been followed by all the subsequent decisions of this Court we hold that the alienation sued on was invalid and dismiss this Second Appeal with costs.

N. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH.]

PRESENT:—SIR JOHN WALLIS, CHIEF JUSTICE, MR. JUSTICE AYLING AND MR. JUSTICE KUMARASWAMI SASTRI.

Muthirulandi Poosari and another. ... *Appellants** (*Defendants*).

v.

Muthandi Poosari and others ... *Respondents* (*Plaintiffs*).

F. B.

Muthirulandi Poosari v. Muthandi Poosari

Madras Survey and Boundaries Act (IV of 1897), S. 11—Boundary dispute—Order of Survey officer under S. 11—Finality—Effect on rights of parties—Unsuccessful party continuing in possession after date of order—Effect.

S. A. No. 1882 of 1917. 18th February, 1919.

1. (188) I. L. R. 6 Mad. 76.
2. (1900) I. L. R. 24 Mad. 219.
3. (1902) I. L. R. 26 Mad. 31.
4. (1914) I. L. R. 38 Mad. 850.
5. (1914) I. L. R. 42 Cal. 455.
6. (1882) I. L. R. 6 Bom. 298.
7. (1876) I. L. R. 1 Mad. 235. (P. C.)

F. B.

Muthirulandi Poosari v. Muthandi.

An order of the Survey Officer under S. 11 of the Survey and Boundaries Act of 1897 concerning a boundary dispute is, if not reviewed by the appellate authority or questioned by suit as provided in the Act, conclusive as to the rights of the parties, and none the less so because the unsuccessful party who was in possession at the date of the order was not subsequently ousted from possession.

Krishnamma v *Achayya*. [1] cons.

Second appeal against the decree of the District Court of Madura in Appeal Suit No. 274 of 1916, preferred against the decree of the Court of the Additional District Munsif of Madura in Original Suit No. 312 of 1913.

The Court (Seshagiri Aiyar and Phillips, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH:

Phillips, J.

Phillips, J.—The question at issue in this appeal is whether the suit site belongs to plaintiffs' or defendants. The District Judge, differing from the District Munsif, has found that in litigation between the predecessors of the parties in 1900 the suit lane was found to belong to plaintiffs. In 1904—1906 the Madura Town Survey took place and the site was demarcated by the survey authorities as belonging to defendants. In the written statement it was pleaded that this demarcation took place after the settlement of a dispute between the parties and we must take it that this was so, although respondents now set up a contention, which was apparently never set up before, that there was no dispute about the site. In this view the decision of the Survey Officer was not *ultra vires*, whatever view be taken of the litigation of 1900 and 1902, for the parties referred their dispute to him and he had jurisdiction to determine it. The decision of the Survey Officer was not appealed against, nor did plaintiffs file a suit within one year of the order. The District Judge, however, relying on the decision in *Krishnamma* v. *Achayya* [1] has held that in this suit for possession the decision of the Survey Officer does not estop plaintiffs from asserting their rights, and has found that plaintiffs were in possession in 1900 and 1902, and that the present suit is not barred by limitation by virtue of S. 13 of Act IV of 1897. The decision in *Krishnamma* v. *Achayya* [1], does not appear to have been overruled, but in *Kamaraju* v. *The Secretary of State for India* [2], it was held that the decision of a Survey Officer under the Boundary Act (1860) was *res judicata*, and this was the view of another Full Bench in *Muthammal* v. *The Secretary of State for India* [3]. Similarly in *B. Krishna Rau* v. *Lakshmana Shanbhogue* [4], *Velayuthan* v.

1. (1879) I. L. R. 2 Mad. 306. 2. (1887) I. L. R. 11 Mad. 309 (F. B.)
3. (1914) I. L. R. 39 Mad. 1202=27 M L J 539.
4. (1881) I. L R 4 Mad. 302.

F. B.

Muthirulandi Poosari v. Muthandi.

Phillips, J.

Laksmana [1] and *Peela Yerakayya* v. *Venkata Krishnamaraju* [2] it was held that an adverse order on a claim petition, when no suit was afterwards filed to set it aside, was a bar to the same plea in subsequent proceedings. In *Raj Bahadur Singh* v. *Achumbit Lal* [3] which is quoted as authority in *Krishnamma* v. *Achayya* [4], it was held that it was unnecessary to set aside an adoption, which was wholly invalid, before bringing a suit for possession, and undoubtedly when the order to be set aside is *ultra vires* a suit need not be brought to set it aside before suing for an independent relief. (*Vide Shivaji Yesji Chawan* v. *The Collector of Ratnagiri* [5]. In *Jagadamba Chaodhrani* v. *Dakhina Mohun Roy Chaodhri* [6] the decision in *Raj Bahadur Singh* v. *Achumbit Lal* [3] was explained as being based upon this ground, and the Judges in *Nagu* v. *Salu* [7] referred to this and consequently doubted the authority of *Krishnamma* v. *Achayya* [4].

We cannot accept respondents' contention by which it is sought to uphold the decree appealed against, that plaintiffs had held adverse possession for over 12 years, for such possession must have been interrupted when the Survey Officer gave his decision and fixed the demarcation stones. It might be possible to distinguish *Krishnamma* v. *Achayya* [4] on the ground that in that case it was not shown that the demarcation interfered with plaintiff's possession so as to give rise to a cause of action, but as the facts appear to be very similar to those of the present case I think it advisable to refer to a Full Bench the following question:—

"When a plaintiff's claim has been disallowed under the Surveys and Boundaries Act IV of 1897, but he has been in possession of the property, does the decision of the Survey Officer operate as *res judicata* in a subsequent suit for possession".

Seshagiri Aiyar, J.

Seshagiri Aiyar, J.—I agree that the question should be referred to a Full Bench. I take the facts found to be these:— There was a decision in favour of the plaintiff in Original Suit No. 802 of 1900 about a plot of ground. Subsequent to the decision the parties disputed whether that decision included the property in suit. Even in the suit, the Courts below are not agreed whether the plot in dispute was included in the previous decree, the Court of First Instance holding one way and the Lower Appellate Court the other way. In 1904 there was a survey of the Town of Madura. From the judgment of the District Judge I take it that the plaintiff and the defendant asked the Survey Officer to determine to which

1. (1886) I. L. R. 8 Mad. 506.
2. (1917) 6 L. W. 281.
3. (1879) L. R. 6 I. A. 110.
4. (1879) I. L. R. 2 M. 306.
5. (1886) I. L. R. 11 Bom. 429.
6. (1886) I. L. R. 13 Cal. 308.
7. (1890) I. L. R. 15 Bom. 424.

F. B.

Muthirulandi Poosari v. Muthandi.

Seshagiri Aiyar, J.

of them, the site now in dispute belonged. I am also of opinion that it must have been with reference to the question whether the decree included this site or not. I am sure that the decree was before the Survey Officer. He gave his decision in favour of the defendant. Plaintiff did not bring a suit to contest it. Mr. Venkatarayaliah contended that so long as a person against whom a Survey Officer has given his decision is in possession of the property he is not bound to set aside the order; and he is supported by *Krishnamma* v. *Achayya* [1]. I regard the decision of the Survey Officer as in the nature of an award assigning the property in dispute to the defendant. In that view the defendant acquired a title to the property on the date of the Survey Officer's demarcation. The authorities to which my learned brother referred show that in similar circumstances where the legislature has enacted that a decision would be final unless set aside within a prescribed period by the Civil Court, the party against whom the order was passed would be barred by *res judicata* even though he was in possession. *Krishnamma* v. *Achayya* [1] is not reconcilable with these decisions. I therefore agree that the question propounded by my learned brother should be submitted to the decision of a Full Bench.

[Before the argument, the Chief Justice remarked that it did not appear from the record that there was a dispute and that the written order of the Survey Officer was not in the records, and then their Lordships allowed the argument to proceed on the assumption of the existence of a dispute and an order of the Survey Officer thereon.]

M. S. Ramanuja Iyengar, for *C. S. Venkatachariar* for the Appellant referred to Ss. 11, 12 and 13 of the Madras Surveys and Boundaries Act, and submitted that the decision of the Survey Officer was final until it was set aside, and not having been set aside within a year, the decision was *res judicata* in a subsequent suit. Reference was also made to S. 25 of the old Act (XXVIII of 1860). *Krishnayya* v. *Achayya* [1], went upon a wrong view of *Raj Bahadur Singh* v. *Achumbit Lal.* [2]

[The Chief Justice :- There was no dispute in *Krishnayya* v. *Achayya* [1], and therefore it was distinguishable.]

[He was stopped.]

A. Venkatarayaliah and *L. Venkatanarasiah* for the Respondent :—The order of the Survey Officer had not been enforced. His client was in possession in spite of that order. There was a decree in his favour prior to the order.

1. (1879) I. L. R. 2 M 306. 2 (1879) L. R 6 I A. 110.

F. B.

Muthirulandi Poosari v. Muthandi.

Seshagiri Aiyar, J.

[The Chief Justice.—The demarcation of the boundary was conclusive on the question of possession.]

It might be so, but the Survey Officer had no authority to deal with questions of title. So his order could not be *res judicata*.

M. S. Ramanuja Iyengar in reply referred their Lordships to S. 11, Cl. (2) to show that the Survey Officer could decide on question of title as well and further submitted that *Krishnayya* v. *Achayya* [1] was not correctly decided, even if the facts be taken to be that there was no dispute in that case.

[The Chief Justice observed that they would leave the correctness or otherwise of *Krishnayya* v. *Achayya* [1], open.]

The Court expressed the following

Opinion :—Assuming that in this case the boundary was disputed and the dispute was the subject of an order by the Survey Officer under S. 11 of Madras Act IV of 1897, we think that order, if not reviewed by the appellate authority or questioned by suit as provided in the section was conclusive as to the rights of the parties, and none the less so because the unsuccessful party who was in possession at the date of the order was not subsequently ousted from possession. In *Krishnamma* v. *Achayya* [1], there does not appear to have been any order under S. 25 of the Boundaries Act of 1860, which corresponds to S. 11 and 12 of the present act. The suit had been treated in the District Court as a suit governed by Article 16 to Schedule II of the Limitation Act of 1871 "to set aside any act of an officer of Government in his official capacity, not herein otherwise expressly provided for." The official act appears to have been the actual demarcation of the land by fixing the boundary stones. If there was an order in that case under S. 25 of the Act of 1860, we think the decision was wrong.

N. A. S. V. V.

1. (1879) I. L. R 2 Mad. 306.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE KRISHNAN.

Chakravarthi Jagannadachariar and another ... *Appellants* (2nd Respt. in the Lower Appellate court and Newly added respondent).*

v.

Seenu Bhattachariar alias Ramaswami Bhattachariar and others ... *Respondents (Plaintiffs and Defendants 5, 7, 8, 9, 12 to 14 and newly added respondent).*

Jagannadachariar v. Seenu Bhattachariar.

Trustees of a temple—Suspension of hereditary archaka pending enquiry into alleged misconduct—Order of interim suspension kept in force for an unreasonably long period without enquiry being made—Interim order treated as a punitive order of suspension without notice to archaka—Order of suspension, invalid—Suit by archaka for recovery of office and for damages for wrongful suspension—Liability of temple funds.

The Trustees of a temple suspended a hereditary archaka pending enquiry into his alleged misconduct The trustees however failed to make the intended enquiry for a long time and without notice to the archaka they treated the *interim* order of suspension as a punitive order to be in force till the archaka vindicated his character in a court of law by proceeding against a certain newspaper which had published particulars of the alleged misconduct. The archaka thereupon sued the trustees for recovery of his office and for damages for wrongful suspension from office. The defence of the trustees was that the archaka was guilty of misconduct and that the order of suspension was justifiable on the merits.

Held, (1) that having regard to the unreasonable delay on the part of the trustees in making an enquiry into the conduct of the archaka, the order of suspension, as an *interim* order, ceased to be in force long before the date of suit.

(2) that the order of suspension if treated as a punitive order, was invalid as having been passed without notice to the archaka and without giving him an opportunity to be heard in his defence, though on the merits there might be sufficient grounds for making the order,

(3) that the plaintiff was therefore entitled to a decree for recovery of his office and for damages for wrongful suspension, and

(4) that the trustees, in suspending the archaka, having acted on behalf of the temple and in what they conceived to be the best interests of the institution the plaintiff was entitled to recover the damages decreed to him from the funds of the temple.

Seshadri Aiyangar v. *Ranga Bhattar* [1], *Thiruvambala Desikar* v *Manikkavachaka Desikar* [2], *Venkata Narayana Pillai* v. *Ponnusami Nadar* [3], *Willis* v. *Sir G Gipps* [4] referred to.

Second appeal against the decree of the District Court of Tanjore in A. S. No. 187 of 1915 preferred against the decree

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* S A. No. 2171 of 1917. 10th January 1919.

1. (1911) I. L. R. 35 M. 631=21 M. L. J. 580.
2. (1916) I. L. R 40 M. 177=30 M. L. J. 274
3. (1917) I. L. R. 41 M. 357=33 M L. J. 660.
4. (1846) 5 Moo P. C. 379.

Jagannadachariar v. Seenu Bhattachariar.

of the court of the District Munsif of Tiruturaipundi in O. S. No. 317 of 1912.

T. Narasimha Aiyangar, C. V. Rajagopalachariar and *S. Panchapagesa Sastri*, for Appellants.

S. T. Srinivasagopalachariar, T. R. Venkatarama Sastri, N. Kunjithapatam Aiyar and *K. Narasimha Aiyangar*, for Respondents.

The court delivered the following

Krishnan, J.

Judgments :—*Krishnan, J*:—In the suit from which this second appeal has arisen, plaintiff sued to recover the office of hereditary archaka in the temple of Sri Sarangapani in Kumbakonum which he alleged he was entitled to, and to restrain the defendants from obstructing him in the discharge of his duties and in the enjoyment of the emoluments appertaining to his office and to obtain damages for his wrongful suspension from it by the trustees, which resulted in loss of emoluments to him. Defendants 1 to 5 were the trustees and the remaining defendants were the plaintiff's co-archakas. The trustees denied plaintiff's claim to his archakaship being hereditary but the lower courts have found as a fact that he is a hereditary archaka and we must accept the finding in second appeal.

The suspension complained of, was by an order of the trustees Exh. O., made in September 1910 and served on the plaintiff, which stated : " On account of the imputations made in the petition concerning you, received from the committee office as also in the " Yatharthavachani " newspaper and the allegations made against you by various respectable persons, the trustees are greatly dissatisfied with you. Pending searching enquiry and till a final disposal of the same, you are suspended from your office. You shall therefore take notice that even during the Murai of any other archaka you should not act as a substitute." Subsequently in April 1911 when the 2nd respondent before us became a new trustee he confirmed the order of suspension. No notice was given to and no explanation was taken from, the plaintiff before the order was passed. The suit was filed in November 1911 ; it was admitted that no enquiry was held into the plaintiff's conduct and it is found that no real attempt to hold such an enquiry was ever made by the trustees. Though the order in its inception was one of temporary suspension pending enquiry, the trustees seem to have subsequently treated it as a final order of suspension till the plaintiff cleared his character

Jagannadachariar v. Seenu Bhattachariar.

Krishnan, J.

in a court of law against the newspaper : they say so in Ex. II. The charge against the plaintiff was, that he was leading an immoral life by frequenting a dancing girl's house and he was therefore unfit to perform the duties of an archaka. The District Munsif, while holding that the allegations of actual immorality against the plaintiff had not been proved, found that he was seen in her company and that he had compromised his good name for purity by his conduct, and that there was a widespread public opinion about his immorality. He therefore held that the order of suspension was a valid one and dismissed the plaintiff's suit.

The District Judge, on appeal, refused to go into the question of plaintiff's alleged immorality and held that as the trustees had failed to make the intended enquiry within a reasonable time after the order of suspension was passed, their action in keeping plaintiff indefinitely out of office without a definite finding, after notice to him and proper enquiry, that he was unfit to do the duties of that office, was wrongful and that they were therefore liable in damages. He gave a decree declaring that the plaintiff was a hereditary archaka and that the order of suspension had ceased to be in force from the date of suit and directed that the plaintiff be restored to his office and awarded damages to him at Rs. 250 a year from the date of plaint to the date of reinstatement. He directed defendants 1 and 5 who were parties to the order of suspension to pay each 1/5th of the damages and costs personally and as the other trustee defendants were new trustees, he ordered the balance to be recovered from the trust funds.

The second appeal to us has been filed only against that portion of the decree which is against the temple, the trustees against whom personal decrees were passed not appealing. The main question argued before us was, that the learned Judge should have given a finding on the question of plaintiff's immorality because it was contended that if the immorality alleged was established the order of suspension should be held to be valid and in force at the date of suit, whether viewed as one pending enquiry or as one passed by way of punishment for misconduct, any want of notice or of proper enquiry, being immaterial. Reliance was placed for this contention on *Seshadri Aiyangar v. Ranga Bhattar* [1].

1. (1911) I. L. R. 35 M. 631.

Jagannada-chariar v. Seenu Bhatta chariar.

Krishnan, J.

Before however considering this argument, it may be mentioned that it has not been contended before us that the alleged immorality if proved, would not amount to misconduct justifying the suspension of an hereditary archaka by the trustees. Though an hereditary archaka does not hold office at the will and pleasure of the trustees, it was conceded that he might be removed or suspended from office by them for proved misconduct. We need not therefore consider these questions for the disposal of this second appeal.

The case in *Seshadri Aiyangar* v. *Ranga Bhattar*.[1] was no doubt one where an archaka had been suspended by the trustees pending enquiry into his conduct without previous notice ; but before suit the intended enquiry had been held and the offence charged had been found to be proved and apparently the *ad interim* suspension order pending enquiry, had been terminated and replaced by an order after enquiry. That ruling is no doubt an authority for the contention that previous notice and enquiry are not essential to validate an order of suspension pending enquiry, if it is subsequently found that the charge alleged was well founded. It is not necessary to consider whether this ruling should be followed, though it may be remarked that some of the observations in it do not seem to be quite in consonance with the views expressed by the learned Chief Justice in *Thiruvambala Desikar* v. *Manikkavachaka Desikar* [2] and in *Venkata Narayana Pillai* v. *Ponnusami Nadar* [3]. The objection raised in the present case to the validity of the suspension order had reference not so much to its inception as to its continuance beyond a reasonable time without a proper enquiry. Even if the trustees be held to have the power to pass an *ad interim* order of suspension without notice, it seems to me that such power should not be exercised except in cases of urgency where from the nature of the misconduct alleged and other circumstances, immediate suspension from office becomes a necessity to safeguard the interests of the institution. There was hardly any such urgency in the present case. But even if the order was a good one when it was first passed, I am fully in agreement with the District Judge in thinking that it should not have been continued in force for a longer period than was

1. (1911) I. L. R 35 M. 631. 2 (1915) I. L. R 40 M. 177.
3. (1917) I. L R. 41 M. 357.

Jagannada-chariar v. Seenu Bhatta-chariar.

Krishnan, J.

reasonably necessary. There can be no doubt in the present case that the period which elapsed after the date of the order and before the date of the suit, *viz.*, about 14 months, was an unduly long period and I accept the judge's view that there was unreasonable delay and that the order as an *interim* order ceased to be valid before the date of suit.

This position was hardly denied by the 1st appellant's vakil but he argued that the order should be looked upon as a punitive one which was justified by the plaintiffs misconduct. It is doubtful whether the order can be looked upon as a punitive one at all, because whatever the intention of the trustees might have been, plaintiff was never informed that it had that character. But assuming that it could be so done, I am of opinion that the order as a punitive one should be held to be invalid as having been passed without notice and without enquiry, whatever the merits of the case may be. It is a fundamental principle of natural justice that a person charged with an offence or with a misconduct, must be given notice of it and heard in his defence if he wishes to defend before he is condemned. That principle must be recognised and anything done contrary to it cannot be upheld. As the learned Chief Justice quotes in *Thiruvambala Desikar* v. *Manikkavachaka Desikar* [1]. "The laws of God and man both give the party an opportunity to make his defence, if he has any." The *interim* order of suspension pending enquiry without notice does not offend against this principle, as it is only a disciplinary and not a punitive one ; and the ruling in *Seshadri Aiyangar* v. *Ranga Bhattar* [2] is confined to such disciplinary orders. The observations of the Chief Justice in *Venkata Narayana Pillai* v. *Ponnusami Nadar* [3] may also be referred to in this connection. As pointed out by his Lordship there, the Privy Council in *Willis* v. *Sir G. Gipps* [4] recommended that an order of emotion without due notice should be set aside, although on the merits there were sufficient grounds for making it. It is no answer to the invalidity of the order in the present case, viewed as a punitive one, to say that the trustees are prepared to prove facts which would justify it in the opinion of the Court. Plaintiff was entitled to have an order by the trustees, after notice to him and proper enquiry, before he was punished ; the Court's

1. (1907) I.L. R. 30 M. 177 at 190. 2. (1911) I. L. R. 35 M 631.
3. (1917) I. L. R. 41 M. 357. 4. (1846) 5 Moore's P. C. 379.

Jagannada chariar v. Seenu Bhattachariar.

Krishnan, J.,

order is not an adequate substitute for it. To hold otherwise will be to compel the person punished to submit to punishment without knowing the grounds for it or to resort to a court of law before he can find out the grounds on which he had been punished. I am therefore of opinion that the order of suspension, the moment it was treated as a punitive order by the trustees, became illegal and invalid.

In any view, therefore, the order was invalid at the date of suit. It is not necessary to ascertain when exactly before the suit the order became invalid as the District Judge has not given the plaintiff any damages before the date of suit and plaintiff has not appealed against the disallowance of damages prior to suit claimed by him. In awarding plaintiff possession of his office, I think it was open to the District Judge to grant a decree for its emoluments by way of damages, as he has done, from the date of suit to date of reinstatement. No argument has been addressed to us about the quantum of damages.

It was finally argued that the temple funds should not be made to bear any portion of the damages but that the trustees who where the tort-feasors should pay them personally. There can be no doubt in this case that the trustees in passing the order of suspension and continuing it, acted in their capacity as trustees and in what they conceived to be the proper discharge of their duties as such and on behalf of the temple. In these circumstances, I am of opinion that temple funds are liable and plaintiff is entitled to have recourse to them for damages, whether the trustees are liable to make good the loss caused to the temple by their action need not be decided in this case.

I would therefore dismiss the second appeal with costs of the 1st respondent.

Phillips. J.

Phillips, J:—I agree. If the suspension order is treated as an *interim* order pending enquiry, I think the District Judge is right in holding that the trustees were guilty of unreasonable delay in deferring the enquiry for over a year, for this conduct of theirs practically converted the *interim* suspension into a punitive suspension. Treated as a punitive order, it cannot be justified because it was passed without giving plaintiff an opportunity of defending himself. It may seem anomalous that the trustees should b. mulcted in damages for passing an

order which, the District Munsif has found, was in the circumstances, a justifiable order, but the trustees should not have left it to the court to decide after enquiry whether such an order was justifiable and should have exercised the discretion vested in them to pass such an order after due enquiry. It may be open to them to treat the enquiry that has now been held as adequate and to pass such orders as they think fit hereafter, and on this point I express no opinion, but they are liable in damages for causing loss to plaintiff without giving him an opportunity of being heard in self-defence. I agree that the second appeal should be dismissed with costs.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT: —SIR JOHN WALLIS, CHIEF JUSTICE, MR. JUSTICE NAPIER AND MR. JUSTICES KUMARAWAMI SASTRI.

Krishna Shetti alias Krishnayya (deceased) and another ... *Appellants* * *(Plaintiff and his L. R.)*

v.

Gilbert Pinto and others ... *Respondents (Defendants 2 to 7.)*

Lessor and lessee—Permanent agricultural lease—Breach of covenant against alienation—Provision for re-entry—Forfeiture—Power of courts to relieve against—English and Indian law—Transfer of Property Act, Ss 111 *and* 114*—Principle of if applicable to agricultural leases—Contract Act, S.* 74 *(as amended by Act VI* 1899)*—Effect of.*

A court has no power, either under the general law or under S. 74 of the Contract Act (as amended), to relieve against a provision in a permanent agricultural lease for re-entry by the landlord on breach of a covenant against alienation by the tenant.

In enacting S. 114 of the Transfer of Property Act the Indian Legislature did not adopt the provisions of S. 14 of the Conveyancing Act but adhered to the older English doctrine that a court of equity could not relieve against a right of re-entry or forfeiture under any provision or stipulation in a lease for a breach of any covenant in the lease except the covenant for payment of rent.

Barrow v. *Isaacs and Son* [1] relied on.

Per *Chief Justice* (*Napier, J.* dissenting). The provisions of Ss. 105 to 116 of the Transfer of Property Act are not applicable *proprio vigore* to agricultural leases but, in the absence of any special reason for not applying them, the courts when dealing with agricultural leases, are bound to adopt those provisions as embodying rules of justice, equity and good conscience.

Appeal under clause 15 of the Letters Patent against the judgment of the Honourable Mr. Justice Sadasiva Aiyar and of

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* L. P. A. No. 103 of 1916. 6th January 1919.

1. (1891) 1 Q B. 417, 425.

Krishna Shetti v. Gilbert Pinto.

the Honourable Mr. Justice Bakewell dated the 24th July 1917 in S. A. No. 92 of 1916 preferred against the decree of the District Court of South Canara in A. S. Nos. 64 and 67 of 1915 perferred against the decree of the Court of the District Munsif of Mangalore in O. S. No 415 of 1913.

B. Sitarama Row for Appellants.

K. P. Lakshmana Row for Respondents.

The court delivered the following

Wallis, C. J.

Judgments :—*The Chief Justice* :—This is a Letters Patent appeal from the decision of Sadasiva Aiyar, J., who held (Bakewell, J. dissenting), that the court has power to relieve against a provision in a mulgeni or permanent lease, a form of agricultural lease in use in South Canara for re-entry by the landlord on breach of a covenant or condition against any alienation by the lessee of his mulgeni right except in the manner therein provided. The lease, which is inartistically drawn, provides in substance that, if the lessee or his representatives have to sell or mortgage their mulgeni right, they are first to give a written notice to the lessor or his heirs, and, if they fail to act on it or to reply thereto, the lessee is to be free to make the alienation, but that alienations in contravention of these provisions are to be void, and the lessor is to be at liberty to re-enter and enjoy the land inclusive of improvements. This we read as meaning that the lessee is to give notice to the lessor of the terms of any transaction which he proposes to effect by way of sale or mortgage of his mulgeni right, and that the lessor is then entitled to become himself the purchaser or mortgagee on those terms, and as in fact conferring a right of pre-emption.

Two question arise in the case whether the court has any general jurisdiction to relieve in a case of this kind, and if not, whether such jurisdiction has been conferred upon it by the amendment to S. 74 of the Indian Contract Act.

As regards the first question, it is well settled that a court of equity could not relieve against a right of re-entry or forfeiture under any provision or stipulation in a lease for a breach of any covenant in the lease except the covenant for payment of rent. The history of this question is most lucidly explained by Kay, L.J., in *Barrow* v. *Isaacs and Son* [1] : " Courts of Equity " he

1. (1891) 1 Q. B. 417, 425.

Krishna Shetti v. Gilbert Pinto.

Wallis, C. J.

says "assumed jurisdiction to relieve against forfeitures and penalties where the only object was to secure payment of a definite sum of money, even though there was no fraud, accident, surprise or mistake. On this principle it relieved against the payment of the whole penalty on a money bond before the Statutes of 4 and 5 Anne Ch. XVI Ss. 12, 13 and 8 and 9 Wm. 3, C., 11, which enabled the courts of law to give the same relief. Also against forfeiture for non-payment of rent, and by statute 4 Geo.2 C. 28, its powers in this respect were somewhat restricted by limiting the time for their exercise to six months after execution in ejectment. At first there seems to have been some hesitation whether this relief might not be extended to other cases of forfeiture for breaches of covenants such as to repair, to insure and the like where compensation could be made, but it was soon recognised that there would be great difficulty in estimating the proper amount of compensation and since the decision of lord Eldon in *Hill* v. *Barcklay* [1] it has always been held that equity would not relieve merely on the ground that it could give compensation upon breach of any covenant in a lease except the covenant for payment of rent. But of course this left unaffected the undoubted jurisdiction to relieve in case of breach occasioned by fraud, accident, suprise or mistake."

The law as here laid down has been reproduced in the Transfer of Property Act which provides expressly in S. 111 that a lease of immoveable property determines.' (g) by forfeiture ; that is to say (1) in case the lessee breaks an express condition which provides that on breach thereof the lessor may re-enter, or the lease shall become void" and only gives power to relieve against such determination by forfeiture for non-payment of rent (S. 114). It is noteworthy that the Indian Legislature preferred to adhere to the old law in this respect, and did not adopt the provisions of section 14 of the Conveyancing Act of 188, which was followed in several other sections. S. 14 of that Act imposes restrictions on, and confers powers of relief against, forfeiture of leases generally and not merely as regards forfeiture for non-payment of rent, but it leaves the law as it was before with regard to cases such as the present, because it provides in sub-sec. (6) that the section does not extend "to a covenant or condition against the assigning, underletting, parting with the

1. (1811) 18 Ves. 56.

Krishna Shetti v. Gilbert Pinto.

Wallis, C. J.

possession or disposing of the land leased ; or to a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest. This section gives the English courts power to relieve against stipulations which were not regarded by courts of equity as stipulations by way of penalty because they were not intended to secure the re-payment of money; but it did not interfere with provisions such as the present, designed to prevent transfer of the land to third parties against the landlord's will. As observed by Lord Eldon in *Hill* v. *Barcklay* [1] as regards a covenant of this kind. "It is sufficient that the lessor insists upon his covenant ; and no one has a right to put him in a different situation,"—a view to which the legislature has adhered in sub-sec. 6 of S. 14 of the Conveyancing Act.

Such a covenant in my opinion cannot properly be regarded as a stipulation by way of penalty, and it is therefore unnecessary to decide whether provisions in leases for re-entry for breaches of other covenants in the lease can be regarded as coming within S. 74 Indian Contract Act as amended. S. 74 in its present form provides that "when a contract has been broken if a sum is named in the contract as the amount to be paid in case of such breach or *if the contract contains any other stipulation by way of penalty* the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named, or *as the case may be, the penalty stipulated for.*" This amendment and the decisions which give rise to it, have been very fully discussed in *Natesa Ayar* v. *Appavu Padayachi* [2] where it is pointed out that the word "penalty" was first inserted in the Contract Act in 1899 by this amendment and is not defined in the Act. Equity, as we have seen, only considered stipulations in contracts penal which were intended to secure the payment of money, and it may be questioned whether the term has a more extended meaning in this section, which was designed to abolish, so far as India is concerned, the distinction between stipulations, liquidated damages and stipulations for pecuniary payments by way of penalty, and which speaks of the party complaining of the breach

1, (1811) 18 Ves 56 at 64. 2. (1909) I L R 33 M 875.

Krishna Shetti v. Gilbert Pinto.

Wallis, C. J.

receiving reasonable compensation not exceeding the amount named or the penalty stipulated for, and whether it can be construed as affecting the express provisions of S. 111 of the Transfer of Property Act which makes leases determinable by virtue of provisions for re-entry on breach of covenant.

The fact that agricultural leases such as this one are excepted from the operation of Ss. 105 to 116 of the Transfer of Property Act does not in my opinion affect the present question. The Act was framed by eminent English Lawyers to reproduce the rules of English Law in so far as they are of general application and rest on principle as well as authority, and its provisions are in my opinion binding on us as rules of justice, equity and good conscience, when we have to deal with agricultural leases in the absence of any special reason for not applying them. The legislature, wisely in my opinion, if I may say so, has refrained from making these sections applicable *proprio vigore* to agricultural leases for fear of unnecessarily interfering with settled usages which it is undesirable to disturb. But in the absence of special reasons there is no ground for applying a different rule in the cases of agricultural leases and there are many decisions to that effect. For these reasons, I would allow the appeal and modify the decree of the District Judge by giving the plaintiff possession in addition to the reliefs already granted with costs throughout. Four months for removal of superstructure, etc.

Napier, J.

Napier, J. :—I agree with the learned Chief Justice that S. 74 of the Contract Act does not apply to the terms of the contract in this case. I cannot agree with Sadasiva Aiyar, J., that we can apply the principle on which the amendment to that section is based, as I think that we should be very careful in applying statutory provisions that are not in *pari materia.* For the same reason I would not seek the assistance of the Transfer of Property Act as a guide when we are dealing with equitable reliefs especially as in this case we are dealing with material that has been excluded from the purview of the act by express words. Vide, S. 117. The provisions as to forfeiture in the Transfer of Property Act do not coincide with those enacted in the Conveyancing Act which does apply to agricultural leases. There is however no statutory bar to our seeking guidance from English law and I entirely agree with the learned

Krishna Shetti v. Gilbert Pinto.

Kumaraswami Sastri, J.

Chief Justice that courts of equity would not grant relief in the present case. For these reasons I agree that the appeal should be allowed.

Kumaraswami Sastri, J. :—I agree with the judgment of my Lord and have nothing to add.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SESHAGIRI AIYAR AND MR. JUSTICE PHILLIPS.

S. Krishnamurthi Aiyar ... *Appellant** (*Plaintiff.*)

v.

The Taluq Board of Mayavaram represented by its President in Council ... *Respondent* (*Defendant.*)

Krishnamurthi Aiyar v. The Taluq Board of Mayavaram.

Madras Local Boards Act (V of 1884) S. 95—Local Board—Planting of trees on the sides of roads—Branches of trees overhanging private land and causing damage to owner—Suit for damages and injunction against Local Board, if maintainable.

Under S 95 of the Madras Local Boards Act (V of 1884) " every local Board shall, subject to such rules as may from time to time be prescribed . . . . . . provided for . . . the planting and preservation of trees on the sides of roads and on other public places," situate within its local area. The defendant, a Local Board, planted trees on the sides of a road within its local area. The branches of the trees spread over the plaintiff's land adjoining the road and caused damage to the crops on the land. Plaintiff brought a suit for damages and for an injunction directing the defendant, to lop off the overhanging branches of the trees. It was neither alleged nor proved that the defendant was negligent in planting the the trees on the sides of the road. It was contended for the plaintiff that the defendant Local Board was liable for injury to private rights arising from its acts and omissions.

Held, (1) that having regard to the provisions of S. 95 of the Madras Local Boards Act, the defendant Local Board was acting in the discharge of a statutory duty in planting the trees and was not liable for any consequential injury to private individuals in the absence of proof that the defendant was guilty of negligence in the original act of planting the trees;

(2) That the omission to remove the branches of the trees overhanging the plaintiff's land was mere non-feasance on the part of the defendant, a high way authority, for which no action would lie at the instance of a private individual; and

(3) That the plaintiff's suit was, therefore, unsustainable.

Gaekwar of Baroda v. *Gandhi Kacharbai* [1]; *Sankaravadivelu* v. *Secretary of State for India* [2]; distinguished.

Geddes v. *Proprietors of Bann Reservoir* [3]; *Fremantle Corporation* v. *Annois* [4]; *Canadian Railway Co.* v. *Roy* [5]; *Municipality of Picton* v. *Geldert* [6]; *Fregellas* v. *The London County Council* [7]; *Municipal Council of Sydney* v. *Bourke* [8]; *Aiyasami Iyer* v. *The District Board of Tanjore* [9]; referred to.

* S. A. No. 52 of 1918 — 12th December. 1918.

1. (1903) I. L. R. 27 B. 344.
2. (1904) I. L. R. 28 M. 72.
3. (1878) L R. 3 A. C. 430, 438.
4. (1902) A. C. 213.
5. (1902) A C. 220.
6. L. R. (1893) A. C. 524.
7. (1897) 14 T. L. R 55.
8. (1895) A. C. 433.
9. (1908) I. L. R. 31 M. 117.

Krishnamurthi Aiyar v. The Taluq Board of Mayavaram.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Tanjore in A. S. No. 138 of 1917 (A. S. No. 283 of 1917 on the file of the District Court of Tanjore) preferred against ths decere of the Court of the District Munsif of Mayavaram in O. S. No. 272 of 1916.

S. Rangachari for Appellant.

The Hon. The Advocate-General (*S. Srinivasa Aiyangar*), *T. S. Rajagopala Aiyar* and *A.C. Sampath Aiyangar*, for Respondents.

The court delivered the following

Judgment—This is a suit for an injunction against the Taluq Board of Mayavaram directing it to lop off all the branches of certain trees which have spread over the land of the plaintiff. Both the courts below have dismissed the suit holding that such a suit is not maintainable. Before us, it was argued by the learned Vakil for the appellant that the burden of proving due care and caution in the exercise of public duties, is on the defendant's and that the Board should so exercise its powers as not to interfere with private rights. S. 95 of the Local Boards' Act (Act V of 1884) directs the Taluq Board to plant trees on the sides of roads and to preserve them. It is not disputed that the trees complained of, were planted on the sides of the road. There is no allegation that there was any negligence in the doing of this act. The main argument for the appellant was that although the original act was done properly, the Taluq Board is under a liability to see that the results of that act do not injuriously affect private rights. *Gaekwar Sarkar of Baroda* v. *Gandhi Kacharbhai* [1] which was relied on only lays down that in exercising a duty a public body should see that as little damage as possible is done to private individuals. In *Sankaravadivelu* v. *Secretary of State for India in Council* [2] it was held that the duty was not obligatory on the Government to provide a bye-wash, and that therefore in performing this self-imposed task the Government was bound to have respected private rights. It is not necessary to say whether the view of the functions of the Government is right or not. In our opinion these decisions are not applicable to the present case. As the learned Advocate-General contended, before fastening responsibility upon a public body, for acts done by it, the first thing is to ascertain whether the act complained of was done in discharge of a permissive right

1. (1902) I. L. R. 27 B. 344. 2. (1904) I. L. R. 28 M. 72.

Krishnamurthi Aiyar v. The Taluq Board of Mayavaram.

or of a compulsory duty. If Corporations have been authorised to perform certain functions not solely in the interests of the public, their liability may not differ much from the liability of private individuals. But where the Legislature imposes a statutory obligation on a public body, the duty *prima facie* is imposed in the interests of the public and private individuals are expected to submit themselves to some inconvenience in order that the general convenience of the public may be furthered. For these reasons it has been held that unless it can be shown that they have discharged their duties negligently and carelessly, public bodies are not liable in damages to private individuals. In *East Fremantle Corporation* v. *Annois* [1], Lord Macnaughten in delivering the judgment of the Judicial Committee stated : "The law has been settled for the last hundred years. If persons in the position of the appellants, acting in the execution of a public trust and for the public benefit, do an act which they are authorised by law to do, and do it in a proper manner, though the act so done works a special injury to a particular individual, the individual cannot maintain an action. He is without a remedy unless a remedy is provided by the Statute." In the present case there is no provision, so far as we are aware, in the Local Board's Act giving a remedy to an injured individual in cases like the present. In another case, *Canadian Pacific Railway* v. *Roy* [2] the Lord Chancellor stated : "The ground upon which the immunity of a Railway Company for injury caused by the normal use of their line is based is that the legislature which is supreme, has authorised the particular thing so done in the place and by the means contemplated by the Legislature, and that cannot constitute an actionable one in England any more than it can constitute a fault by the Quebec Code." These observations apply with equal force to the acts directed to be done by the Local Boards. In *Geddis* v. *Proprietors of Bann Reservoir* [3] which was quoted for the appellant, Lord Hatherly stated: "If a Company, in the position of the defendants there, has done nothing but that which the Act authorised—nay, may in a sense be said to have directed—and if the damage which arises therefrom, is not owing to any negligence on the part of the Company in the mode of executing or carrying into effect the

1. (1902) A. C. 213.
2. (1902) A. C. 220.
3. (1878) 3 A. C 430 at 438

Krishnamurthi Aiyar v. The Taluq Board of Mayavaram.

powers given by the Act, then the person who is injuriously affected by that which has been done, must either find in the Act of Parliament something which gives him compensation or he must be content to be deprived of that compensation." In *Hammersmith Ry. Co., v. Brand* [1] Lord Cairns stated that "it would be a repugnant and absurd piece of legislation to authorise by statute a thing to be done, and at the same time leave it to be restrained by injunction from doing the very thing which the legislature has expressly permitted to be done." The principle of these decisions was followed in *Aiyasami Aiyar v. The District Board of Tanjore* [2] where a distinction between permissive and obligatory duties was pointed out. No doubt, as was said in *Canadian Pacific Railway v. Parke* [3] even in the case of Corporations if the acts are only permissive the private rights of parties must be respected. Reference may also be made to *Municipality of Picton v. Geldert* [4] in which all the authorities on the subject are collected. Probably the nearest case in point is that reported in *Tregellas v. The London County Council* [5]. That was an action against the London County Council and the complaint was that by the neglect of the Council to lop off the branches of trees plaintiff suffered injury. In that case there was no duty cast upon the Council to plant and preserve trees. Still Lord Russell of Killowen, C. J., held that because the failure to lop off the branch was only non-feasance, no action lay against the County Council. It must be taken now as well established that for mere non-feasance no action for damages will lie against a public body. See *Municipal Council of Sydney v. Bourke* [6] and *Earl of Harrington v. Derby Corporation* [7]. It was argued that although the planting of the trees was done properly, a misfeasance was committed by the failure to prevent damage to plaintiff. In our opinion it would not be consistent with the duty *to preserve* trees that the Local Board should cut off all its branches. The very recent case a summary of which is reported in 145 L. Times Reports, p. 129 (*Moul v. Croydon Corporation*) gives a complete answer to this contention. In that case, the Corporation was charged with the duty of woodpaving road. After 17 years, the wood

1. (1869) L. R. 4 H. L. 171 at 215
2. (1908) I L R 31 M 117.
3. (1889) A. C. 553.
4. (1893) A. C. 524.
5. (1897) 14 T. L. R. 55.
6. (1895) A. C. 433.
7. (1905) 1 Ch. 205.

Krishnamurthi Aiyar v. The Taluq Board of Mayavaram.

blocks swelled and bulged and owing to the obstructions caused by such bulging an accident happend. Avory and Lush, JJ., held that it was not a case of misfeasance; but only one of non-feasance namely neglect to repair the highway, and held that the Corporation was not liable. The learned Judges are reported to have distinguished *Mc. Clelland* v. *Manchester Corporation* [1] on this ground.

In the present case, the Taluq Board on which an obligatory duty to plant and preserve trees has been imposed are exempt from liability on both the grounds, namely (a) that in the discharge of its duties it has not acted carelessly or negligently (b) and that the omission to remove the branches even if it ought to have been done is only non-feasance for which no action at the instance of a private individual lies. We therefore agree with the courts below that the suit was rightly dismissed. The second appeal is dismissed with costs.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHIM, MR. JUSTICE OLDFIELD AND MR. JUSTICE SESHAGIRI AIYAR.

P. S. Krishna Aiyar ... *Appellant** (*2nd defendant.*)

v.

Savurimuthu Pillai ... *Respondent.* (*Plaintiff*).

Krishna Aiyar v. Savurimuthu Pillai.

Civil Procedure Code. S. 49 and O. 21 R. 2—Decree—Payment by judgment-debtor outside court—Omission to certify payment—Assignment of decree to a person with knowledge of the payment—Assignee executing decree and realising money from judgment-debtor—Suit by judgment debtor for damages against decree-holder and assignee—Cause of action—Suit, if maintainable.

The first defendant obtained a decree against the plaintiff and the decree amount was paid out of court by the judgment debtor The payment was not certified by the decree-holder nor did the judgment-debtor inform the court, in time, of the satisfaction of the decree. The first defendant afterwards assigned the decree to the second defendant who was aware of the payment by the plaintiff. Subsequently the second defendant realised the amount of the decree by execution, from the plaintiff, the executing court holding that the prior payment by the plaintiff to the first defendant being uncertified, could not be recognised under O. 21 R. 2 of the Code of Civil Procedure. In a suit by the plaintiff for damages against the first and second defendant.

Held, that as against the first defendant the suit would lie as for breach of a promise or of a statutory duty to certify payment to the Court under O. 21 R. 2 of the Code of the Civil Procedure;

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* L. P. A. 131 of 1917. 20th December 1918.

1. (1912) 1 K. B. 118.

Krishna Aiyar *v.* Savurimuthu Pillai.

that the plaintiff had no cause of action against the second defendant; and that the suit as against the latter should therefore be dismissed.

Appeal under clause 15 of the Letters Patent against the judgment of the Honourable Mr. Justice Phillips in Second Appeal No. 389 of 1916, preferred against the decree of the District Court of Madura in Appeal Suit No. 494 of 1914 (O. S. No. 366 of 1912 on the file of the Court of the District Munsif of Tirumangalam).

[The facts are stated in the judgment of Seshagiri Iyer, J.]

This Letters Patent Appeal coming on for hearing on Monday, the 18th day of March, 1918, the Court made the following

Order :—Before disposing of this appeal it is desirable that we should have a finding whether the 2nd defendant, when he obtained assignment of the decree in question, knew that that decree had been satisfied. The finding will be submitted on the evidence on record within the first week after recess of the High Court, and the parties will be allowed to file objections to the said finding within ten days after notice of the return of the same shall have been posted up in this Court.

[In compliance with the above order, the District Judge of Madura submitted a finding that the 2nd defendant knew that the decree had been satisfied when he obtained the assignment].

T. R. Venkatarama Sastri, for Appellant.

K. Jagannatha Aiyar, for Respondent.

The Court delivered the following

Abdur Rahim, J.

Judgments :—*Abdur Rahim, J.* :—I have come to the conclusion that the plaintiff—respondent had no cause of action against the 2nd defendant in the suit. The 1st defendant obtained a decree against one Antonia Pillai whose executor is the present plaintiff.

The decree amount was paid out of court by the judgment-debtor. The payment however was not certified as required by the law by the decree-holder whose duty it was to do so in the first instance nor did the judgment-debtor inform the Court of the satisfaction as he was entitled to do in default by the decree-holder. The decree was afterwards assigned to the 2nd defendant. A question was raised in the execution of the decree as to whether it had been adjusted, and, if so, whether

Krishna Aiyar v. Savurimuthu Pillai.

Abdur Rahim, J

the adjustment could be recognized. The executing Court held that in the absence of a certificate or record of satisfaction as required by Order 21, Rule 2, it remained an executable decree and it also found that adjustment had not been proved. The 2nd defendant then proceeded to realize the decree amount by execution. The plaintiff, as executor of the judgment-debtor thereafter instituted this suit claiming damages against the 1st and 2nd defandants to the extent of the amount, which the 2nd defendant has realized in execution. It has been well settled, and it can hardly be disputed, that so far as the 1st defendant, the original decree-holder, was concerned, the plaintiff had a good cause of action. This was so laid down as far back as *Viraraghava Reddi* v. *Subbakka* [1] by a Full Bench of this Court and that is also the view of the other High Courts. In that case, it was held that such a suit would lie as for breach of a promise on the part of the decree-holder either not to execute the decree or to enter satisfaction. It was also held that the judgment-debtor could frame his claim against the decree-holder thus in default for damages on the basis of fraud or negligence in not certifying adjustment.

But the question whether there is a cause of action against the assignee of a decree which had been adjusted but the adjustment of which was not certified to the Court, is bare of authority. It cannot be said that there was any sort of contractual relation between the 2nd defendant the assignee in the case and the plaintiff and the mere fact that the 2nd defendant, as found, knew that the decree had been satisfied will not make him guilty in law, either of fraud or of negligence in as much as he was under no obligation to certify adjustment, the decree amount having been received by the original decree-holder before assignment. The executing Court was right in holding that it was bound to treat the decree as still subsisting and to allow it to be executed, by virtue of Order 21, Rule 2, Clause 3 which enacts that "a payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognized by any Court executing the decree. The decree, therefore, on the date of its assignment being one which according to law, the 2nd defendant could enforce, the only way in which the case of the plaintiff could be put is to

1. (1882) I. L. R. 5 Mad. 397.

Krishna Aiyar v. Savurimuthu Pillai.

Abdur Rahim, J.

base it on S. 49 which enacts that "every transferee of a decree shall hold the same subject to the equities, if any, which the judgment-debtor might have enforced against the original decree-holder." It is argued that we must hold that the decree was in this case subject to an equity which bound the assignee who had knowledge of the adjustment before he obtained the assignment. In the first place S. 49 relates to the stage of execution, that is to say, under it, it is the Court executing the decree that has to consider whether it was held subject to any equities which the judgment-debtor could enforce against the original decree-holder. Now the cause of action in a case like this as laid down in *Viraraghava Reddi* v. *Subbakka* [1] is breach of a promise or contract and I am not aware of any general principles according to which the existence of such a contract or promise would create an equity which would be enforceable against the transferee. In the case of sales of immoveable property, no doubt, it is well established that the transferee is bound by a contract to convey the property in favour of another person of which he had knowledge. But that rule, so far as I am aware,has not been extended either to the disposition of moveable properties or of money decrees. We have been referred to a Full Bench decision of the Calcutta High Court in *Goono Monee Dassia* v. *Pran Kishore Dosse*, [2] where the cause of action against the original decree-holder who executed the decree in spite of adjustment out of Court is put on the ground that after such adjustment he held the decree in trust for the judgment-debtor. But I do not think that S. 49 of the Code of Civil Procedure or the corresponding provision of the old Code ever contemplated such an inferential trust. The Full Bench of this Court in *Viraraghava Reddi* v. *Subbakka* [1] does not base it on any such ground and if I may say so with respect the right way to regard the cause of action as laid down in that case is either breach of a promise or of a statutory duty to certify adjustment to Court. The 2nd defendant as I have pointed out could not be said to have committed any breach of promise or having been guilty of violating any statutory duty. We have been also referred to another decision of the Calcutta

1. (1882) I. L. R. 5 Mad 397.

2. (1869) 13 W. R. 69.

Krishna Aiyar v. Savurimuthu Pillai.

Abdur Rahim J.

High Court in *Monmohan Karmokar* v. *Dwarak Nath Karmokar* [1]. But I do not think that the point decided there throws much light on the principles applicable to this case. There the question arose in execution between the assignee of a decree who held it as benamidar of the judgment-debtor and other creditors of the judgment-debtor and having regard to the conclusion of the learned Judges that in those circumstances there was no executable decree, any observations regarding the liability of assignees of decree generally, cannot in my opinion be of much help in the present case. Here there was undoubtedly an executable and subsisting decree and that decree was executed according to law. I hold therefore that there was no cause of action against the 2nd defendant. I may mention that we had called for a finding as to whether the 2nd defendant at the time he obtained the assignment, had knowledge of the adjustment out of Court. The finding is that he had such knowledge, but as I have already stated, that fact cannot make any difference as to his liability in the present suit.

The result is that the appeal must be allowed and the suit as against the 2nd defendant dismissed with costs throughout.

Oldfield, J.

Oldfield, J.:—I am not prepared to accept all the considerations adduced by my learned brethren. But I can give my reasons shortly for agreeing with the conclusions that there is no cause of action against the 2nd defendant; and that is sufficient to justify concurrence in the decision that the suit must be dismissed.

The main question is whether the plaintiff is entitled to recover, not only from the 1st defendant who has once recovered the decree amount, (that is not disputed) but also from the 2nd defendant who has recovered it again by execution. I agree with my learned brethren for the reasons given by them that the claim must be regarded as for damages for injury caused by 1st defendant's failure to certify satisfaction, as he ought to have done after recovering the decree amount. Then the only ground, on which 2nd defendant can be held liable, is that he in some way subjected himself to 1st defendant's liability by taking an assignment from him. There is only one basis put forward for this contention, namely, the terms of S. 49 of the Civil Procedure Code. But no authority has been cited to show that the

1. (1910) 12 Cal. L. J. 312.

Krishna Aiyar v. Savurimuthu Pillai.

Oldfield, J.

section is intended to cover such cases as the present. Whether the fact that it occurs in the chapter relating to execution is a reason against that construction of it, I do not wish to decide. It is at all events not necessary in the present connection to hold that it is final; for there is another clear reason for the same conclusion.

The section provides that the transferee of a decree shall hold the same subject to the equities, which the judgment-debtor might have enforced against the original decree-holder. It seems to me that the section is not intended to mean any more than it says explicitly. It is only intended to make provision regarding the terms on which the decree is to be held; and it is not the contention of the plaintiff in this case, and could not be, that the 2nd defendant's holding of the decree in any way arose from or is connected with the 1st defendant's wrongful conduct, or was ever conditional on his paying compensation for it. In fact, the claim against the 2nd defendant is entirely independent of his holding the decree in that way. In these circumstances, I agree with the order proposed by Mr. Justice Abdur Rahim.

Seshagiri Aiyar, J.

Seshagiri Aiyar, J. :—I agree with the judgment of Abdur Rahim, J., just pronounced.

In O. S. No. 316 of 1905 the first defendant obtained a decree against the plaintiff. Subsequent to the decree, it was arranged that the plaintiff should pay off the debts due from the 1st defendant to third parties and that he should enter up satisfaction of the decree obtained by him against the plaintiff. The plaintiff's case is that he did perform the agreement, but that the 1st defendant fraudulently failed to enter up satisfaction. An application was made for execution by the 1st defendant which was opposed by the plaintiff. But it was allowed on two grounds (1) that as no satisfaction was entered, the decree can be executed and (2) that the arrangement between the parties was not carried out by the plaintiff. After this order permitting execution, the 1st defendant transferred the decree to the 2nd defendant. He executed it and recovered the money from the plaintiff. This was on the 7th September 1908. Thereupon the present suit was instituted by the plaintiff for damages for wrongfully executing the decree in contravention of the original arrangement. The courts below

Krishna Aiyar v. Savurimuthu Pillai.

Seshagiri Aiyar, J.

have found that the plaintiff did perform his part of the contract; and gave a decree for damages against both the defendants. The 2nd defendant appealed to this Court in Second Appeal No. 389 of 1916. The two learned Judges who heard the appeal differed in opinion. Sadasiva Aiyar, J., was for reversing the decree as against the 2nd defendant, but Phillips, J., was for confirming the decree against him. Hence this Letters Patent Appeal.

Although I did not dissent from the opinion of my learned colleagues that a finding should be called for on the question whether the 2nd defendant was aware that at the time the decree was transferred to him, the plaintiff had performed his part of the contract, in my opinion, there is no cause of action at all against the 2nd defendant. There is no privity of contract between the plaintiff and the 2nd defendant. The suit for damages is for the breach of the contract. That is well settled. See *Viraraghava Reddi* v. *Subbakka* [1] and *In the matter of Medai Kaliani Anni* [2]. What gives the aggrieved party a right of action is the failure to carry out the terms of the contract to enter up satisfaction. It is true that the measure of damages in such a suit is ordinarily the amount recovered by the wrong doer. But that is not because the plaintiff is entitled to follow the amount recovered in whosoever's hands it may be found, but because the Courts for the sake of convenience have enunciated the rule that the suffering must be estimated as the actual loss sustained by the aggrieved party. In all the four High Courts in this country it has been held that where there is a wrongful sale of property in violation of the agreement to enter up satisfaction, the property purchased at the execution-sale cannot be recovered by the injured party but that he is only entitled to damages. *Yellappa* v. *Ramachandra* [3], *Rewa Mahton* v. *Ram Kishen Singh* [4], *Jaikaran Bharti* v. *Ragunath Singh* [5] and *Krishnaswami Ayyangar* v. *Ranga Ayyangar* [6] all enunciate this principle. Now the ground on which these decisions proceed is that the execution proceedings are not invalid by themselves, although they had been taken in violation of the agreement; because under the Civil Procedure Code so long as the decree is

1. (1882) I. L. R. 5 Mad 397. 2. (1907) I. L. R 30 Mad. 545.
3. (1896) I L. R. 21 Bom. 463. 4. (1886) I. L. R. 14 Cal. 18.
5. (1898) I. L. R. 20 All. 254. 6. (1896) I. L R 20 Mad. 369=7 M. L. J. 71

Krishna Aiyar v. Savurimuthu Pillai.

Seshagiri, Aiyar, J.

allowed to be outstanding without satisfaction having been entered in respect of it, it is an enforceable decree. Parties deriving benefit thereunder should not be deprived of their right because of a pre-existing arrangement between the judgment-debtor and the decree-holder. That being the provision of law, all the four High Courts have held that the right of the judgment-debtor who has been deprived of property is to sue the decree-holder for damages caused by the deprivation, and not to sue the purchaser for the restoration of the property taken from him. I think the principle of these decisions is applicable to the present case. The 2nd defendant obtained execution in a proceeding, which was held to be subsistent and enforceable. The fact that it is not land but money that he recovered ought to make no difference in the application of the rule of law. Therefore I am unable to hold that the 2nd defendant is bound to return the money which he recovered in execution against the plaintiff.

But it was suggested that the knowledge of the 2nd defendant that, at the time he obtained a transfer of the decree, the plaintiff had performed his part of the contract entered into with the 1st defendant would make a difference in the case. Now there are some recognised principles on this subject. For example, we have S. 27 of the Specific Relief Act which enables a party with whom a contract of sale has been entered into to sue for specific performance not only against the person who agreed to sell the property to him but also against the person who has purchased that property with knowledge of the agreement to sell. The principle of this section is borrowed from the well known rule in equity that "equity regards that as done which ought to have been done." From this maxim, the rule has been deduced "that from the time of the contract for the sale of the land, the vendor, as to the land, becomes a trustee for the vendee; and the vendee, as to the purchase money, a trustee for the vendor who has a lien upon the land therefor. And every one coming in by subsequent and representative title, and every subsequent purchaser from either with notice, becomes subject to the same equities as the party would be to whom he succeeds, or from whom he purchased." It is doubtful whether this principle is applicable to contracts relating to money or moveable property. For the sake of argument,

Krishna Aiyar v. Sivurimuthu Pillai.

Seshagiri Aiyar, J.

I shall assume that it covers such cases also. What follows? The person with whom the contract not to execute the decree has been entered into can proceed to recover the amount wrongfully levied from him not only from the promisor, but also from the party who has benefited by the breach. This assumes that the proceeding is wrongful and void *ab initio*. But where legally the decree is executable, it is not open to argument that the party who recovered under such a decree is compellable to refund what he has recovered. Moreover the four cases from the four High Courts to which I drew attention already, show that the principle underlying S. 27 of the Specific Relief Act has no application to such cases. In my opinion when once it is conceded, that the aggrieved party is not entitled to recover land or other property sold in execution contrary to the terms agreed upon between the judgment debtor and the decree-holder, it is impossible to suggest any ground of liability on the part of a third party deriving benefit under the decree. This conclusion derives further support from decisions like that reported in *Bairagulu* v. *Bapanna* 1 where it was held that no injunction will lie to prevent a party from executing a decree. The obvious reason is that the decree is legal and enforceable and the right of action to the aggrieved party arises on the breach of the agreement and not upon the fact that the decree has been executed. The decision in *Monmohan Karmokar* v. *Dwarak Nath Karmokar* 2 has been very much misunderstood. It is a case of a judgment-debtor obtaining an assignment of decree nominally after it had been satisfied. The question related to the equities enforceable in execution against the assignee. The observations about similar equities being available in suits are pure obiter. They really have no bearing on the present case. However, if that judgment lays down the proposition contended for by their respondent's vakil I am unable to agree with it. As regards *Goonoo Monee Dossia* v. *Prankishore Dossee* 3 the question was between the original parties to the decree and no question of assignment was considered. With all respect I am unable to accept the proposition that the decree-holder is a trustee for the judgment-debtor. As regards section 49 of the Civil Procedure Code on which reliance was placed, it is enough

1. (1892) I. L.R. 15 Mad. 302=2 Mad L J 112 2. (1910) 12 Cal. L.J. 812.
3. (1869) 13 W. R. 68 (F. B).

Krishna Aiyar v. Savurimuthu Pillai.

Seshagiri Aiyar, J.

to point out that that Section deals only with equities in the course of execution, for example there may be cross-decrees or a question of a set off in respect of costs. In such matters, the transferee decree-holder is bound by the equities subsisting between his assignor and the judgment-debtor. Vide *Sinnu Pandaram* v. *Santhoji Row* [1]. That has no application to the cases of suits for damages. I therefore agree with Sadasiva Aiyar, J., that there is no cause of action against the 2nd defendant. This being my view it is unnecessary to consider the question of limitation.

As I have held that there is no cause of action against the 2nd defendant, I would reverse the decree of the Courts below, and dismiss the suit against the 2nd defendant with costs throughout.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Full Bench.]

PRESENT :—SIR JOHN WALLIS, CHIEF JUSTICE MR. JUSTICE OLDFIELD AND MR. JUSTICE SESHAGIRI AIYAR.

Muthuvelu Mudaliar ... *Appellant (Plaintiff).*

v.

Vythilinga Mudaliar and others ... *Respondents (Defendants 1, 2 and supplemental 4th defendant.)*

Muthuvelu Mudaliar v. Vythilinga Mudaliar.

Transfer of Property Act. S. 58 Mortgage by Conditional Sale—A single transaction of a sale with a right of re-purchase before a certain date—Whether effects a mortgage by Conditional sale irrespective of the intention of the parties.

Where in one and the same transaction, land is sold absolutely but with a right of re-purchase to be exercised before a certain date, the transaction does not necessarily become by virtue of the provisions of S. 58 of the Transfer of Property Act a mortgage by Conditional Sale irrespective of the intention of the parties.

Palaniappan v. Subbaraya Goundan, 1 L. W. 80 overruled.

Second Appeal against the decree of the court of the Additional Temporary Subordinate Judge of Tanjore in Appeal suit No. 45 of 1917, preferred against the decree of the court of the District Munsif of Tiruvalur in Original Suit No. 256 of 1915.

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* S. A. No. 881 of 1917. 13th February, 1918.

1. (1902) I. L. R. 26 Mad. 428.

Muthuvelu Mudaliar v. Vythilinga Mudaliar

The Court (Sadasiva Aiyar, and Napier, JJ.) made the following,

ORDER OF REFERENCE TO A FULL BENCH :—

Sadasiva Aiyar, J. :—The transaction in question in this case was effected after the Transfer of Property Act came into force and the two documents making up the transaction not only came into existence on the same day but each refers to the other. There can be no question therefore in this case that they form the same and a single transaction. (See *Palaniappan* v. *Subbaraya Gounden*[1], and S. A. No. 540 of 1916 where I have tried to collect the Indian cases bearing on the question under what circumstances, two documents formed a single transaction and when they must be deemed to indicate two separate transactions). In this case, therefore, we have not got the difficulties which arise from (*a*) the dates of the two documents being different or (*b*) from the second document reciting that out of pure grace and favour, etc. (See *Jhanda Singh* v *Wahiduddin*[2]), the transferee of the first document agrees to reconvey, or (*c*) from the document or documents being dated before *Thambusami Pillai's case* or *Pattabhirama Aiyar's case* or before the Transfer of Property Act came into force. In *Palaniappan* v. *Subbaraya Goundan*[1] where the execution of the two documents was divided by an interval of two days (the registration having been, however, on the same day) and where the second deed styled itself expressly as the counterpart of the first deed, I held that the two documents constituted a single transaction of mortgage by conditional sale. In *Jhanda Singh* v. *Wahiduddin*[3] Richards, J., says at pages 599 and 600; "It seems to me that if we held that at the time of the execution of the first deed the parties intended that the second deed also should be executed, we ought to hold that the two deeds constituted a mortgage by conditional sale and that the plaintiff has a right to redeem. On the other hand, if, at the time of the execution of the sale-deed, there was no intention of executing the second deed, the defendants are entitled to have the latter construed strictly and quite independent of the provisions of the Transfer of Property Act and the law of mortgages." (In that case the documents were of the years 1852-1853 respectively). 'There can be, no doubt in my opinion, that if the two deeds were of even date, an almost irresistible presumption would arise in favour of the transaction being a mortgage.'" In that case, no doubt on the particular facts (including the fact that the documents were separated by the interval of a year from each other) it was held that they did not constitute a single transaction of mortgage by conditional sale.

1. (1913) I. L. W. 80. 2. (1916) I. L. R. 38 All 570=31 M.L.J. 750, P. C.
3. (1911) I. L. R. 33 All. 585.

Muthuvelu Mudaliar v. Vythilinga Mudaliar.

As regards the contention that there must be the previous existence of the relation of creditor and debtor in order to constitute a transaction which is an ostensible sale (with a covenant for re-purchase or covenant of rescission of the sale on repayment of a certain amount) a mortgage by conditional sale, I see no sufficient reason to change the view expressed in *Palaniappan* v. *Subbraya Goundan* (1) that such considerations cannot be imported into India were we have got the plain words of Section 58 of the Transfer of Property Act to guide us as to what the nature of a transaction is which should be regarded as a mortgage by conditional sale.

Coming to S. 58 of the Transfer of Property Act itself, I need not say that I have given respectful and anxious consideration to the views of my learned brother (as reported in the case in *Maruthai Goundan* v. *Dasappa Goundan* as also in the judgment to be just now pronounced by him) as to the intention of the legislature in using the words 'mortgagor' 'mortgage money' and 'mortgagee' in the definition of mortgage by conditional sale in clause (c) of Section 58 of the Transfer of Property Act. I regret that I am still of opinion that the legislature used those short words merely to avoid involved phraseology. No doubt, it would have been meticulously accurate if the language of the clause were as follows : " Where the transferor in a *transfer transaction* ostensibly sells the property, the *subject of transfer* on condition that on default of payment of the *consideration money for the transfer* on a certain date, the sale shall become absolute etc." A mortgage by conditional sale is ostensibly a sale. " Mortgages going under various names all over the country assume this form ; in fact it is exceedingly doubtful if there are many genuine cases of sales with conditions of repurchase at all " where the documents are of the same date or where there is only a single document of sale and agreement to reconvey. The legislature evidently knew this and therefore in the Transfer of Property Act, they introduced the provision that such transactions must be *prima facie* regarded as mortgages and " as more likely to effectuate the intention of the parties than the rule to the contrary." In *Madhav Rao Keshavrao* v. *Saheb Rao Ganpatrao* 3, the facts were exactly similar to those of the present case, there being a simultaneous execution of a sale-deed and an agreement to reconvey. Beaman, J., says at page 123 : "I have no doubt but that the contemporaneous documents of 1892 do constitute what is known in this country as a mortgage by conditional sale. Neither have I the least doubt that that was the intention of the parties executing them. Such

1. (1913) 1 L.W. 80, 87. 2. (1916) 31 M. L. J. 375
3 (1914) I. L. R. 39 Bom. 119.

Muthuvelu Mudaliar v. Vathilinga Mudaliar.

mortgages are legislatively recognized, and I have only to observe that in no true mortgage of this class *will any debt be apparent.* It is idle therefore to criticise mortgages by conditional sale by reference to the essential conditions of a mortgage in the English sense of that word. It only needs to peruse the judgments of the courts relating to these mortgages to observe how necessary it is to bear this in mind when the question is whether upon an interpretation of documents alone, the result is a mortgage by conditional sale or an out and out sale." I am aware that in *Narayan Ram Krishna* v. *Vighneshwar* [1] a document of conveyance containing an agreement to reconvey was construed differently by Batchelor and Shah, JJ., though Batchelor, J., was a party to the case of *Kastur Chund Lakhmaji* v. *Jakhia Padia* [2] in which a sale-deed and a contemporaneous deed of agreement to reconvey were treated as a mortgage by conditional sale. Doubtless there were certain other circumstances relied on in *Narayan Ramkrishna* v. *Vighneshwar* [1] but in my opinion whenever there is a single transaction (whether contained in one or more documents) and where that transaction is an ostensible sale with a covenant to reconvey in case the consideration money for the transfer is repaid, it directly comes within the definition of mortgage by conditional sale in Section 58 (c) of the Transfer of Property Act; and in such cases it is wholly unnecessary and even irrelevant to consider other circumstances for arriving at a decision on the legal nature of the transaction. (I might add that the case in *Narayan Ramkrishna* v. *Vighneshwar* [2] does not refer to the earlier decision in *Madhav Rao Keshavrao* v. *Saheb Rao Ganpatrao* [3]. In S. A. No. 540 of 1916, Phillips, J., and myself had to decide the question arising on the following facts:—There were two documents Exhibit A and Exhibit I of the same date (27th October 1883) one being a sale-deed and the other an agreement by the vendee that he would enjoy the lands for a fixed period of 10 years and that after that period the vendor could get back the lands by repayment of the purchase money before the commencement of the cultivation season in any year. We held that the two documents ought to be read together and that they were intended to be a mortgage by conditional sale. In that case the lower courts had taken into consideration several facts which happened both at the time and after the execution of the documents in arriving at the intention of the parties and decided as a question of fact that the parties intended a mortgage by conditional sale. Hence it was thought unnecessary to decide the neat and simple question whether

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1 (1916) I. L. R. 40 Bom. 378 2. (1915) I L. R. 40 Bom. at page 74.
3 (1914 I L. R. 39 Bom 119.

Muthuvelu Mudaliar v. Vythilinga Mudaliar

solely on the definition of "mortgage by conditional sale" found in the Transfer of Property Act, the documents constituted in the eye of the law a mortgage transaction. I therefore said at the end of my judgment in S. A. No. 540 of 1916: "I do not wish to enter into the question whether particular form of expression used in a document (or set of documents to be read together) necessarily imply and have the legal effect of creating a mortgage by conditional sale or of only creating an absolute right in the transferee with an obligation on his part to re-convey. On that question again there is a conflict of authority both in this court and in the Bombay High Court and it is not absolutely necessary to decide that point for disposing of this second appeal": and then, I said that the question might have to be referred to a Full Bench when it directly arises.

As regards the decision in S. A. No. 2180 of 1915, there were indications in the documents themselves in that case that the agreement to re-sell was merely an act of generosity on the vendee's part and that the option to re-purchase was a personal favour granted to the vendor alone and was not intended to extend to strangers deriving title from him.

In the result I agree in making the order of reference to a Full Bench as proposed by my learned brother.

Napier, J.—This Second Appeal raises the question whether certain documents constitute a mortgage by conditional sale or a sale with a right of re-purchase. The sale-deed Exhibit B was executed on the 4th October 1883. The consideration recited is Rs. 455 which is arrived at by taking the amounts due on three hypothecation bonds of earlier dates amounting to Rs. 510 and a small amount of Rs. 30 due on a Small Cause Court decree making a total of Rs. 530. Of this amount Rs. 75 is to be received from a third party leaving a balance of Rs. 455. The deed contains the usual words for an absolute sale, but it is to be subject to an agreement executed and given to the vendor on the same day. It continues "After the lapse of the term of 3 years mentioned in the agreement in respect of the lands of this sale-deed, I shall get the miras entered in your name." Exhibit A, the agreement, is of the same date. It recites the purchase of the land and provides that "if you pay me in cash the sum of Rs. 455 in the Ani season of any year within the third year from this day, I shall receive and deliver possession of the said land to you on that date..............Besides I shall execute and give you a release deed in respect of that land on the stamp you will give me. If you delay to pay money and receive the sale-deed and the release deed till after the date above mentioned this

Muthuvelu Mudaliar v. Vythilinga Mudaliar.

agreement shall stand cancelled." It is contended before us that the sale and the re-purchase are obviously part of the same transaction, and I agree that this is so.

It is then contended that where the transaction is all one, it amounts to a mortgage, whatever was the intention of the parties ascertainable from evidence properly admissible. This is a proposition I am unable to accept. If the Transfer of Property Act makes such a document a mortgage, then certainly the intention of the parties is immaterial. I have discussed this point in the case reported in *Maruthai Goundan* v. *Dasappa Goundan*[1] and have there expressed the view which had Bakewell, J's concurrence that the legislature in Section 58 of the Transfer of Preperty Act did not intend to make transactions mortgages against the will of the parties, but only to provide that where the parties intended to make a mortgage the transaction was none the less a mortgage because it was put in the form of an outright sale and an agreement for re-purchase. The opposite contention would necessarily go as far as this, that even if the agreement recited a refusal to grant a further loan the transaction would still be a mortgage. As I have pointed out, this view requires the substitution of the words—'transferor' for 'mortgagor', 'transferee' for 'mortgagee' and 'consideration' for 'mortgage money' in clause (c) of S. 58. I am aware that my learned brother takes a diametrically opposite view and that there is other authority to which he has referred which supports his contention, but, with deference to his opinion, I do not think the language of the section supports this view. I quite agree that the Act in several places uses the word 'vendor' in relation to contract prior to sale. But I do not think that this affects the question. To my mind the word 'mortgagor, means a person intending to create a mortgage by the transaction just as 'vendor' sometimes means a person who has made a contract intended to be followed by a sale. I know of no provision in the code under which a person is called 'vendor' who did not intend eventually to make a sale. If the object of the legislature had been to make such a drastic alteration in the existing law as to make documents interpartes operate both against their form and against the intention of the parties so that all such transactions become mortgages, it seems to me that it could have found words more apt for the purpose than those which we have here. And further, I can see no reason why we should attribute to the legislature an intention to do something with regard to conditional mortgages which it is not doing to other forms of mortgages, namely, to create a mortgage against the will of the parties. S. 58 begins by defining a mortgage and says that (in the circum-

1 (1916) 31 M. L. J. 375.

stances set out) the transferor is called a mortgagor and the transferee a mortgagee and the money of which *payment is secured* the mortgage money. It then proceeds to enumerate four forms which a mortgage can take, namely, simple mortgage, mortgage by conditional sale, usufructuary mortgage and English mortgage; and I do not think that it intended to do anything more than enumerate. This is my view on the language of the section, but if it is permissible to go to the law prior to the Act as I must assume that it is in view of the fact that courts have differed on the construction of the Act, there can be little doubt what the law was. In a recent case decided by the Privy Council reported in *Jhanda Singh* v. *Wahiduddi in* where the sale and agreement so repurchase were prior to the Transfer of Property Act their Lordthips expressly state that it was not disputed that the test in such cases was the intention of the parties to the instruments. But that intention must be gathered from the language of the documents themselves viewed in the light of the surrounding circumstances. Their Lordships refer with approval to the judgment of Lord Cranworth in *Alderson* v *White* [2] which is as follows :—That *prima facie* an absolute conveyance containing nothing to show that the relation of debtor and creditor is to exist between the parties does not cese to be an absolute conveyance and become a mortgage, merely because the vendor stipulates that he shall have a right to a repurchase. In *the Manchester, Sheffield. Lincolnshire Railu ay Company* v. *The North Central Wagon Company* [3] Lord Macnaughten says on page 568; 'In all these cases the question to 'what was the real intention of the parties' and quotes with approval the decision in *Alderson* v. *White.* For the present I do no think it neceessary to decide what the intention of the parties was, as I think we should get a ruling from the Full Bench on the broad question on which my learned brother and I differ. I would therefore refer to a Full Bench the question whether where in one and the same transaction land is sold absloutely but with a right of repurchase to be exercised before a certain date, the transaction necessarily becomes by virute of S. 58 of the Transfer of Property Act a mortgage by conditional sale, whatever the intention of the parties might have been.

A. Krishnaswami Aiyar for *B. Sitarama Row* for Appellant.

S. Muthiah Mudaliar for Respondent.

The Court expressed the following

Opinion :—*Wallis, C. J.* :—It is in my opinion not open to us to answer the question referred to us in the affirmative. Wallis, C.

1. (1916) I. L. R. 38 All. 570.
2. (1858) 2 De Gex and J. 97
3. (1888) 13 Appeal Cases 554.

Muthuvelu Mudaliar v. Vythilinga Mudaliar.

consistently with the decisions of the Privy Council in *Pattabhiramier* v. *Venkatarow Naicken* [1], *Thumbusawmy Moodaly* v. *Hossain Rowthen* [2], *Sithal Pershad* v. *Luchmi Pershad* [3], *Bhagwan Sahai* v. *Bhagwan Din* [4], *Balkishen Das* v. *W. F. Legge* [5] and *Jhanda Singh Wahiduddin* [6]. All these decisions lay down that in cases in India not governed by Bengal Regulation XVI of 1806 instruments of this kind are to take effect according to their tenor, unless it appears from the terms of the instrument or the surrounding circumstances, excluding oral evidence of intention as inadmissible, that the intention was to effect a mortgage. In *Thumbuswamy Moodaly* v. *Hossain Rowthen* [2], the Privy Council refused to disturb a decision of this Court which took a different view, because it considered that the parties might have been misled by a course of decisions in this Court which their Lordships held to be erroneous, but they also indicated with sufficient clearness that there was no room for any such misconception in future.

In *Balkishen Das* v. *W. F. Legge* [5] there were held to be sufficient indications that the transaction was intended to be a mortgage, and this decision was explained as proceeding on this ground in the subsequent decision in *Jhanda Singh* v. *Wahiduddin* [6].

It is true that all these cases dealt with transactions before the passing of the Transfer of Property Act, but I do not think that Act made any difference in the law on this subject in this part of India. In *Balkishen Das* v. *W. F. Legge* [5] their Lordships observed that it might be assumed that the framers of the Transfer of Property Act intended in S. 58 to state the existing law and practice in India. The section begins with a definition of the terms " mortgage " "mortgagor " and " mortgagee", and proceeds, as pointed out by Napier, J., to describe or define the different sorts of mortgages which are met with in India. Sub-section (*c*) deals with mortgages by conditional sale in which the transaction is ostensibly a sale or transfer of ownership in exchange for a price (S. 54), but is really intended to be a mortgage or transfer of an interest in specific immoveable property for the purpose of securing the payment

1. (1871) 13 M. I. A 560.
2. (1875) I. L. R. 1 Mad. 1.
3. (1883) I. L. R. 10 Cal. 30
4. (1890) I. L. R. 12 All. 387.
5. (1899) I. L R. 22 All. 149
6. (1916) I. L. R. 38 All. 570.

of money, S. 55 (a). As the transaction is really a mortgage and only ostensibly a sale, sub-section (*c*) refers to the transferor as the mortgagor, and speaks of the ostensible sale of the mortgaged property subject to certain conditions as to the payment of the mortgage money. Whether a particular transaction is really a sale, or ostensibly a sale and really a mortgage, must still be decided in accordance with the decisions of the Privy Council in the cases already cited. There is in my opinion nothing in the definition in S. 58 (*c*) which favours the view that wherever the sale-deed and the agreement to reconvey from one transaction it must necessarily be a mortgage and not a sale. On the other hand both in *Sithal Pershad* v. *Luchmi Pershad* [1] and *Bhagwan Sahai* v. *Bhagwan Din* [2] there was clearly only one transaction, and it was none the less held by the Privy Council to be a sale and not a mortgage. For these reasons I am of opinion that the decision in *Palaniappan* v. *Subbaraya Goundan* [3] should be overruled and the question answered in the negative.

Oldfield, J.—I agree.

Seshagiri Aiyar, J :—I entirely agree with the learned Chief Justice. But out of deference to the opinion of Mr. Justice Sadasiva Aiyar from whom we are differing, I wish to say a few words. In *Pattabhiramier* v. *Venkatarow Naicken* [4] the Judicial Committee laid down that a contract between the parties should be interpreted according to its tenor and that the practice of reading into it preconceived legal principles should be discouraged. All the subsequent judgments of the Privy Council seem to me to emphasise this cardinal principle. In *Thumbusawmy Mudaly* v. *Mahomed Hossain Rowthen* [5] the Judicial Committee construed the document in that case as a mortgage because they held that the parties to that contract must be deemed to have contracted with reference to the wrong view of law enunciated by the Sudder Court at Madras before *Pattabhiramier* v. *Venkatarow Naicken* [4] was decided. They further said that the legislature should intervene to correct the impression which the decisions of the Sudder Court had left in the minds of the litigant public. In *Sithal Pershad* v. *Luchmi Pershad Singh* [6] which relat-

1. (1890) I. L. R. 12 All 387.
2. (1888) I. L. R. 10 Cal. 30.
3. (1918) I L. W. 80.
4. (1871) 13 M. I. A. 560.
5. (1875) L R. 2 I A. 211.
6. L. R. 10 I.A. 129.

Muthuvelu Mudaliar v. Vythilinga Mudaliar.

ed to a contract before the passing of the Transfer of Property Act, although the documents were of the same date; the Privy Council held that the transaction was a sale and not a mortgage. They stated that evidence can be looked into to ascertain the intention of the parties. *Bhagwan Sahai* v. *Bhagwan Din* [1] where also the documents were of the same date, the transaction was construed as a sale. In *Balkishen Das* v. *Legge* [2] it was held that the transaction amounted to a mortgage. But it was pointed out that, in the documents themselves there were indications that the parties intended to effect a mortgage by conditional sale". It was further said that the Transfer of Property Act was framed in accordance with the existing law and practice regarding mortgages. The next case before the Board was *Jhanda Singh* v. *Wahiduddin* [3]. Here again their Lordships held that the transaction was an out and out sale. Their Lordships said that the intention of the parties which was the test in such cases must be gathered from the language of the documents themselves viewed in the light of the surrounding circumstances. This is a distinct direction to Courts in India that in such matters the intention of the parties and the surrounding circumstances are the proper guide and not the fact that the documents were of the same date or that they were expressed in any particular form. After this statement of the law it is not open to Courts in India to lay down any inflexible rule from the bare fact that the documents were of even date or were interdependent upon a single settlement. Mr. Muthiah Mudaliar referred in support of the view taken by Mr. Justice Sadasiva Aiyar to the use of the expression 'one transaction' in page 288 of this judgment. Their Lordships said :—" If no such agreement was made before the deed of sale was executed and the latter deed was an after-thought, only suggesting itself after the sale-deed had been executed and delivered, it would not suffice. The execution of the deed of sale and of the contract of repurchase would then form two separate and independent transactions, not two connected and interdependent parts of one and the same transaction." I do not understand their Lordships to lay down that if there was a single settlement and the two documents are connected and are interdependent it must necessarily

1. (1890) L R. 17 I A. 98. 2. (1899) L. R 27 I. A. 58
3. (1916) L. R. 43 I. A. 284=38 All. 570.

Rama-chandra Iyer v. Parames-waram Munbu.

lead to the inference that there was a mortgage and not a sale. All that was said was that an essential requisite for construing such documents as a mortgage is that they should be dependent upon a single arrangement, and not that such a test is a conclusive criterion of the transaction being a mortgage. I do not propose to consider the decisions of the various High Courts. In Madras, after *Thumbusawmy Moodelly* v. *Hussain Rowthan* [1] there have been some cases which are not quite reconcilable with each other. But these do not help us much. It is in *Palaniappan* v. *Subbaraya Goundan* [2] that Mr. Justice Sadasiva Aiyar enunciated the proposition which has led to this reference. If I may say so with respect, the learned Judge does not attach sufficient importance to the language of S. 58, Clause C of the Transfer of Property Act. I agree with Mr. Justice Napier that the use of the word mortgage is not *per incuriam*. Clause (C) speaks of a "mortgagor ostensibly selling the mortgaged property." That language implies that there must be in reality a mortgage and that the sale must be merely a cloak. A party who wishes the document to be understood as being different from what the words suggest should show that the form in which the language is clothed does not express the real intention of the parties and that in substance the parties intended that there should be a transaction different from what the language imports In other words there must be evidence to show that the parties intended a mortgage although they used expressions which *prima facie* connote a sale. I am therefore of opinion that the question referred to us must be answered in the negative.

C. A. F.

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1. (1875) I. L. R. 1 Mad. 1.

2. (1913) 1 L. W. 80.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHIM, MR. JUSTICE OLDFIELD AND MR. JUSTICE COUTTS TROTTER.

T. R. Ramachandra Iyer and another ... (*1st Appellants* plaintiff and Supplemental 3rd plaintiff*).

v.

Ponniath Akathuthu Parameswaram Munbu and others ... (*Respondents. Defendants 1 to 3, 6 7 and 5th Defendant's Legal representative*).

Rama-chandra Iyer *v.* Parames-waram Munbu.

Civil Procedure Code, (V of 1908 S. 92—Public trust—"Persons having and interest in the trust", meaning of— Hindu temple—Mere right to worship if sufficient to enable a person to sue—Religious Endowments Act, (XX of 1863) Ss. 14 and 15—Scope of

Per *Oldfield and Coutts Trotter. JJ.* (Abdur Rahim, J dissenting). The interest in the trust that is required of a plaintiff by S. 92 of the Code of Civil Procedure is a present and substantial interest and not a remote and fictitious or purely illusory interest. The definition of persons interested in a temple, mosque, etc., contained in S. 15 of the Religious Endowments Act ought not to be imported into S. 92 of the C. P Code. The question whether any given person has or has not an interest sufficient for the purpose of S. 92, C P. Code, is a question of fact to be decided by the Court having regard to the particular circumstances of each case. A Hindu having a mere right to worship at a temple, is not by reason of that sole qualification, without more, competent to institute a suit for a scheme in respect of the institution under S. 92 of the C. P. Code.

Per *Abdur Rahim, J.* Whether the interest of the plaintiffs in a particular foundation or public trust is sufficient to support an action under S 92, C.P. Code, may to some extent depend upon the facts of each case It is clear, however, that persons belonging to that section of the public for whose benefit a public trust has been created are in the position of beneficiaries and as such, possess a sufficient interest to support a suit under the Code. In the case of a Hindu temple or Mahomedan mosque, persons entitled to attend there for purposes of worship are presumably the beneficiaries intended by the founder and such persons have an interest in the institution. Consequently it is competent to any person who has a right of attendance and worship at a Hindu temple, to be the plaintiff in a suit under S. 92 of the C. P. Code concerning the institution. If the right of attendance and worship is vested in the plaintiff, the possibility that he may not often or ever, actually worship at the temple, makes no difference as regards his right to sue under S. 92, C. P C.

The history of legislation on the subject shows that the interest required of a plaintiff by S. 92 of the new C. P. Code, need not be pecuniary, direct or immediate or in any way different from that required by Ss. 14 and 15 of the Religious Endowments Act for purposes of suits relating to temples and mosques.

In re Bedfords' Charities 1 *The Corporation of Ludlow* v. *Greenhouse* 2 *Jan Ali* v. *Ramnath mandal* 3 *Sajedur Raja Chowdhuri* v *Gour Mohun Das Baishnav* 4 *Gopala Muppanar* v. *Subramania Iyer* 5 referred to.

L. P. A. No. 4 of 1918. 21st November, 1918.

1. 2 Swans. 470.
2. 1 Bligh N. S. 17.
3. (188) I. L. R 8 C. 32.
4. (1897) I. L. R. 24 C. 418.
5. (1914) 27 M. L J 253.

Appeal under Clause 15 of the Letters Patent against the decree, dated the 14th day of November 1917, in Appeal No. 116 of 1916, preferred to the High Court against the decree of the District Court of North Malabar in Original Suit No. 21 of 1914.

Ramachandra Iyer v. Parameswaram Munbu.

The case was heard by the Chief Justice and Kumaraswami Sastri, J. in the first instance.

The Court delivered the following

Judgments:—*The Chief Justice*:—This is an appeal from the decree of the District Judge of North Malabar dismissing a suit filed against the trustees of a temple at Tellicherry on the West Coast under S. 92, Civil Procedure Code with the requisite authority, on the ground that one of the plaintiffs had not an interest in the trust within the meaning of the section. The plaintiff in question, Mr. T. R. Ramachandra Aiyar, one of the senior and leading practitioners of this Court, resides in Madras, and is Vice President of a Sabha or Association which specially concerns itself with temple affairs in Southern India. It has not been contended before us that this circumstance gives him the requisite interest, nor has it been seriously argued that the fact, that in the practice of his profession he has on two or three occasions visited Tellicherry and has then worshippel at the suit temple, and may possibly do so again, is enough to distinguish his position in this respect from that of the rest of the Hindu community throughout the length and breadth of India. The broad proposition contended for by Mr. Ganapathi Aiyer for the appellants is that every Hindu Temple must be presumed, according to the decision in *Gopala Muppanar* v. *Subramania Iyar* [1] to be dedicated for the use of all Hindus, of whom there were 270½ millions in British India at the last census, to say nothing of the additional millions in Native States, and each of these individuals has therefore an interest in the trusts of every Hindu Temple in India within the meaning of S. 92, Civil Procedure Code. Incidentally he argued that the position of Mahomedans as regards the mosque is the same, as the ownership of the mosque is regarded as vested in the Deity and every Mahomedan has a right to worship at every mosque. *Gopala Muppanar* v. *Subramania Aiyar* [1] merely decides that every Hindu resorting to a Hindu Temple has, presumably the right to worship there. This does not seem to me to warrant an inference that the temple must be considered as dedicated to the use of all Hindus whether they resort to it or not.

Wallis, C. J.

In support of this contention, Mr. Ganapathi Aiyar craved in aid the definition in S. 15 of the Religious Endowments Act, 1863, of

1 (1914) 27 M. L. J. 253.

Ramachandra Iyer v. Parameswaram Munbu.

Wallis, C. J.

the interest entitling people under S. 14 of that Act to sue trustees in respect of any misfeasance, breach of trust or neglect of duty, for specific performance of the duty, damages or removal. That section says that the interest need not be a pecuniary or a direct or immediate interest, and goes on to provide expressly that "any person having a right of attendance, or having been in the habit of attending, at the performance of the worship or service or of partaking of any distribution of alms" shall be deemed to be a person interested within the meaning of S. 133 of the Act. This definition has not been applied to S. 92 (formerly S. 539) of the Code which has quite a different history, and to take a definition from one statute and apply it to another easily leads to error, as when the definition of the word "attest" in the Indian Succession Act was used in interpreting the same word in the Transfer of Property Act, and when an earlier decision under S. 539 based on a consideration of this very definition necessitated the intervention of the legislature. Secondly, the definition in S. 15 was expressly excluded because S. 539, as originally enacted, expressly required that there should be a direct interest, and the subsequent omission of the word, which will be referred to later, has not had the effect of rendering the definition applicable. Lastly, it seems clear that even under S. 15, the legislature intended the plaintiff to have some special interest in the endowment whether based on the right to worship or on habitual attendance, and this intention will be frustrated if it be held that every Hindu and every Mahomedan in India or beyond has an interest within the meaning of S. 15, because it must be presumed that every temple and every mosque has been dedicated for the use of every Hindu and every Mahomedan who may resort to it. The language of the section does not suggest that the legislature was aware that all Hindus must be regarded as having a right to worship in every temple. Otherwise they would not have thought it necessary to provide that mere habitual attendance should confer the right to sue. We were not referred to any case in which a plaintiff has sued without having some interest of his own as distinct from the rest of the community either under S. 14 or under the general law as in *Panchcowrie Mull* v. *Chumroolall* [1], *Jawahra* v. *Akbar Husain* [2], *Srinivasa Chariar* v. *Raghava Chariar* [3], *Monmotho Nath Das* v. *Harish Chandra Das* [4].

I do not pursue this subject, because what we have to construe is not S. 15 of the Religious Endowments Act of 1863 or the general law, but S. 92 of the Civil Procedure Code, and I am clearly of opinion

1. (1878) I. L. R. 3 Cal 568; 2. (1884) I. L. R. 7 All. 178; (F.B.)
3. (1897) I.L.R. 23 Mad. 28=7 M.L J. 281. 4. (1906) I. L. R. 33 Cal. 905.

Rama-chandra Iyer v. Parameswaram Munbu.

Wallis, C. J.

that to entitle him to sue under that section, it is not enough that the plaintiff is a Hindu by religion, but he must have a clear interest in the particular trust over and above that which millions of his country-men may be said to have by virtue of their religion. S. 92 was first enacted as S. 539 of the Code of 1877 and was modelled as regards the right of suit, as in some other respects, on the provisions of Sir Samuel Romilly's Act as interpreted by the Court of Chancery (see the observation of Shepherd, J., in *Rangasami Naickan* v. *Varadappa Naickan* [1]). Before that Act, the Attorney-General representing the Crown as *Parens Patriae* was alone entitled to proceed by way of information, ordinarily in the Court of Chancery, for the enforcement of charitable trusts. Usually he did so only on the relation of private persons who gave security for the costs, and as he had a clear right to proceed by way of information if so advised, the Court was not concerned to inquire whether the relators had any interest of their own; *Attorney-General* v. *Vivian* [2], *Attorney-General* v. *Bucknall* [3]. When however Romilly's Act authorised "any two or more persons" to proceed by petition under that Act with the authority of the Attorney-General, Lord Eldon ruled in one of the earliest cases under the Act., in *re-Bedford Charities* [4] that no person could petition who had not "a direct interest," in the Charity and held that those petitioners in that case who described themselves as elders of the congregation of Dutch and Germen Jews assembling at certain synagogues in London had no right to petition the Court with reference to the alleged right of Jewish children residing at Bedford to participate in the benefits of the Bedford Charity, the revenues of which by Act of Parliament were to be applied partly in providing dowries for poor maids resident in Bedford and partly in providing a free school for poor boys born and resident within the town of Bedford. The same view was approved by the House of Lords in *Ludlow (Corporaotin of)* v. *Greenhouse* [5], where Lord Eldon observed that the Court was bound to take care "that the petitioners have a clear interest in the subject and that they prove themselves to have that interest in the subject which they state upon their petition." The Indian Legislature clearly intended to legislate in this sense when they provided in S. 539 of the Code of 1877 that the persons authorised to sue under that section must have a "direct interest in the trust". Westropp, C. J., and Kemball, J., having raised the question in *Radhabai* v. *Chimnaji Bin Ramji Sali* [6], without expressing any opinion whether the words "public charitable purposes" could be

1. (1894) I. L.R. 17 Mad 462 at p. 467.
2. (1826) 1 Russ. 226,236.
3. 2 Atk. 328.
4. (1819) 2 Swans, 470.
5. (1827) 1 Bligh, N. S. 17—91,
6. (1878) I. L. R. 3 Bom. 27,

Rama-chandra Iyer v. Parames-waram Munbu.

Wallis, C. J.

held applicable to the devasthan of an idol or temple dedicated merely to the purposes of such idol or temple, the legislature altered the language to public, charitable or religious purposes. In *Karuppa* v. *Arumuga*, [1] Innes, O. C. J., and Muthuswami Aiyar, J., held that the section as originally drafted did not apply to the case of an endowment for purposes of religious as well as charitable, and declined to consider the fact that the opposite view was expressed in the statement of objects and reasons assigned for the alteration of the section in 1882. I do not think they would have come to that conclusion, if their attention had been called to the fact that ever since the statute of Elizabeth religious uses have formed one of the most important branches of charitable uses in English Law, so that the English lawyer who drafted the Code of Civil Procedure must necessarily be taken to have included religious in charitable purposes unless they were expressly excluded. I have no doubt that the legislature intended to include charitable uses in S. 539 as passed in 1877 and that the alteration in 1882 was only intended to remove doubts. The intervention of the legislature was again necessitated in 1887 in consequence of the decision in *Jan Ali* v. *Ramnath Mundal* [2], that Mahomedans residing in the village of Gopalpur and in the habit of attending prayers at the mosque there had not a direct interest in the endowment of the mosque within the meaning of the section. The attention of the learned Judges was not called to the fact that these provisions were taken from Romilly's Act as interpreted by the English Courts and that the plaintiffs were clearly persons having a direct interest within the meaning of those decisions, and they founded their conclusion upon an inference drawn from the language of S. 15 of the Religious Endowments Act, which as I have pointed out is not applicable and as it seems to me, would scarcely warrant their inference if it were. If the actual worshippers had not a direct interest, it is difficult, as observed by Mahmood, J., in a later case, to say who had. The effect of the decision would have been very largely to make the section a dead letter as regards temples and mosques, and the legislature thought fit to indicate the necessity for a more liberal construction than had been taken in this and some other cases in 1888 by taking the word " direct" out of the section. I am however clearly of opinion that "the interest in the trust" must still, in Lord Eldon's words, be a "clear interest," that is to say, a present and substantial, and not a remote and fictitious or purely illusory interest, and that, whilst indicating the necessity of taking a more liberal view than had been taken by our courts in some cases, the legislature did not intend that we should go to the other extreme and allow any member of the

1. (1882) I. L. R. 5 Mad. 383. 2. (1881) I. L. R. 8 Cal. 32.

Rama-chandra Iyer v. Parames-waram Munbu.

Wallis, C. J.

Hindu and Mahomedan public to sue with the requisite consent in regard to every temple or mosque in British India. It is, I think, quite clear, both under Romilly's Act and the section that the Court must be satisfied, not only that the requisite authority has been given, but also that those to whom it has been given have a clear interest in the trust. That interest, it seems to me, if the provision is not to be altogether illusory, must arise from some special relation in which the plaintiff stands to the endowment in question as compared with the whole body of religious community throughout India ; in other words, he must be in a position to derive some benefit from the trust in respect of which the suit is filed. I do not think it necessary or safe to go further than this on the present occasion. In all the cases cited which have arisen since the omission of the word "direct" in 1887, the plaintiffs have clearly had an interest which would entitle them to proceed under Romilly's Act in England, *Chintaman Bajaji Dev* v. *Dhondo Ganesh Dev* [1], *Sajedur Raja* v. *Baidyanath Deb*, [2] *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav* [3] and *Ganapati Ayyar* v. *Savithri Ammal* [4]. In *Mohiuddin* v. *Sayiduddin* [5] it was expressly ruled that the requisite interest under the section must be existing and not contingent—a ruling which appears to me to apply to the present case. In *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav* [3] it is clear from the statement in the judgment at page 427 that the plaintiffs were not only habitual worshippers at the particular temple but also took part in the management and worship. That case is therefore no authority for the proposition that any lesser degree of interest is required under S. 92 than under Romilly's Act, and with reference to the observation as to Ss. 14 and 15 of the Religious Endowments Act, there is no reason for supposing that the learned Judges considered that the Hindu and Mahomedan public generally were entitled to sue under that section in respect of any temple or mosque. That question was not raised before them. As regards *Jawahra* v. *Akbar Husain* [6] 7 All. 178, Mahmood, J., observed at page 184 " I hold that it is an undoubted principle of Muhammadan Law that the persons who have the most direct interest in a mosque are the worshippers who are entitled and accustomed to use it " and the case in no way supports the proposition that a Muhammadan unconnected with a particular mosque would have an interest entitling him to sue with regard to it under S. 539, now S. 92 of the Code.

Coming back to the facts of the present case, I think that Mr. Ramachandra Aiyar is rather in the position of the members of the

1. (1888) I. L. R. 15 Bom. 612 ;
2. (1892) I. L. R. 20 Cal. 397.
3. (1897) I. L. R. 24 Cal. 418 ;
4. (1897) I. L. 21 Mad. 10.
5. (1893) I. L. R. 20 Cal. 810, 817
6. (1884) I. L. R. 7 All. 178. (F. B.)

Ramachandra Iyer v. Paramesvaram Munbu.

Wallis, C. J.

Jewish synagogue who presented a petition under Romilly's Act in the interest of their co-religionists at Bedford in the *Bedford Charity case* and were held not to be entitled to proceed under that Act because they had no interest of their own in the charity. It was not suggested that the possibility that they might some day lose their fortunes and settle at Bedford with a view to their families benefiting under the charity gave them a sufficient interest under the Act. Such a contention would, I cannot help thinking, have been regarded as extravagant. So too, I think, Mr. Ramachandra Aiyar has no sufficient interest of his own to entitle him to sue under S. 539 as regards this temple.

I have since had the advantage of reading the judgment prepared by my learned brother and, will only add that I have proceeded on the assumption that Hindu Temples are *prima facie* to be taken to be dedicated for the use of all Hindus resorting to them. There are however three hundred million Hindus and I know not how many thousand temples in India, and to say that the bare possibility, however remote, that a Hindu might desire to resort to a particular temple gives him an interest in the trust, appears to me to defeat the object with which the legislature inserted these words in the section. That object was to prevent people interfering by virtue of the section in the administration of charitable trusts merely in the interest of others and without any real interest of their own.

Under Romilly's Act, although there was no express restriction, the Courts from the very first held that sanction could only be given to a person having an interest of his own and S. 92 expressly requires it. I would dismiss the appeal with costs.

Kumaraswami Sastri, J.

Kumaraswami Sastri, J.:—The question raised in this appeal is whether the "interest" required by S. 92 of the Civil Procedure Code must be something more than *a mere right to worship* in the temple in respect of which the suit is brought. So far as the application of S. 92 to Hindu Temples is concerned, I think the answer must depend on a consideration of the peculiar nature of Hindu Temples and the rights of Hindus therein. There is, so far as I am aware, no such thing as a purely parochial temple, access to which is prohibited or refused to persons outside a particular locality. If any such exist, persons outside the locality have no interest whatever and no question will arise as to the power of persons outside the benefits of the trusts to sue under S. 92.

All important Hindu Temples are built in honour of one of the principle deities, generally Siva or Vishnu under their various names, and the God is supposed to grace the temple with his presence. Along with the presiding deity is worshipped his Sakti (or consort) and minor deities are often installed in the larger temples. The dedication of

Rama-chandra Iyer v. Paramesw aram Munbu.

Kumara-swami Sastri, J.

the temple is to all Hindu devotees of the deity residing in India, Hindu religion enjoins pilgrimages to temples as one of the sacred duties to be performed and various *Stala Puranas* describe the special virtues of the larger and more important temples. The right of Hindus to worship in temples viewed in the light of the *puranas* and *agamas* has been discussed by Sadasiva Aiyar, J., in *Gopala Muppanar* v. *Subramania Aiyar*,[1] and I entirely agree with his conclusions The dedication of the temple being to all Hindu devotees of the presiding deity, it seems to me that they are persons for whose spiritual benefit the trust was created. Every Hindu has therefore a legal right to worship in a temple, unless by the terms of the dedication or the usage of the particular temple he is denied right of access. It is no doubt true that he can only worship in the temple if he gets there and that possibly distance or other considerations may prevent him from availing himself of the benefit but, it can hardly be said that his interest is only contingent or is a mere possibility on that account. It is a vested right which can be exercised at any time and irrespective of the place where the person resides. As regards mosques it has been held by a Full Bench of the Allahabad High Court in *Jawahra* v. *Akbar Husain* [2] that all the members of the Muhammadan community are entitled to use a mosque.

It is probably the peculiar nature of Hindu and Muhammadan religious endowments which induced the legislature to give so wide a meaning to the word interest in S. 15 of the Religious Endowments Act of 1863 which enacts that the interest required by S. 14 to enable a person to sue need not be pecuniary, direct or immediate, and that a right of attendance is sufficient.

The right of suit to two or more persons who have obtained the necessary sanction was first conferred by S. 539 of the Civil Procedure Code of 1877. As has been pointed out in *Rangasami Naicken* v. *Varadappa Naicken* [3] the section was framed on the lines of Romilly's Act (52 Geo. III. Chap. 101) in the light of the decisions of the English Courts as to its scope and effects. There are however material points of difference which have been pointed out by Best and Weir, JJ., in *Subbayya* v. *Krishna* [4]. S. 539 of the Code of 1877 required a *direct interest* and the word direct was used in order to give effect to the decisions in *In re Bedford Charities* [5] that no person could petition under Romilly's Act who had not a direct interest in the Charity and in the *Corporation of Ludlow* v. *Greenhouse* [6], where a "clear interest" was required. The result however was not very

1. (1914) 27 Mad. Law Journal. 253, 2. (1884) I.L.R. 7 All. 178
3. (1894) 1 L. R. 17 Mad. 462. 4. (1890) I.L R. 14 Mad. 186=1 M.L.J.95.
5. (1819) 2 Swans, 470. 6. (1827) 1 Bligh, N. S. 17.

Ramachandra Iyer v. Parameswaram Munbu.

Kumaraswami Sastri, J.

happy. In *Jan Ali* v. *Ramnath Mundul* 1 it was held that two of the worshippers of a mosque who lived in the village where the mosque was situated had no " direct interest " in the mosque so as to enable them to sue under S. 539. A similar restricted view was taken in *Lutifunnissa Bibi* v. *Nazirum Bibi* 2. The decision in 8 Calcutta was followed by the Madras High Court in *Narasimha* v. *Ayyan* 3 where Kernan and Wilkinson, JJ., went to the extent of holding that even the right of management and of partaking in the food offerings did not give persons a direct interest within the meaning of S. 539. In *Jawahra* v. *Akbar Hussain* 4 Mahmood, J., dissented from the decision in *Jan Ali* v. *Ramnath Mundul* 1 and was of opinion that " it was an undoubted principle of Muhammadan Law that the per sons who have the most direct interest in a mosque are the worshippers who are entitled and accustomed to use it." In *Manohar Ganesh Tambekar* v. *Lakmiram Govindram* 5 which was confirmed by the Privy Council, (see *Chotalal* v. *Manohar Ganesh Tampekar* 6). West and Birdwood, JJ., held that priests who took part in the worship of the temple had a direct interest within the meaning of S. 539 of the Act of 1877.

In 1888 the legislature thought it fit to intervene and by S. 44 of the Amendment Act VII of 1888, the word 'direct' in S. 539 was omitted. All the section now requires is that the plaintiff should have an interest in the trust. As pointed out by Banerjee and Rampini, JJ., in *Sajedur Raja Chowdhuri* v. *Gour Mohundas Baishnav* 7, the inference is that the legislature intended to allow persons having the same sort of interest that is sufficient under S. 14 of Act XX of 1863 to maintain a suit under S. 539. Effect has to be given to the deliberate omission of the word " direct" and it has to be borne in mind that the legislature had Act XX of 1863 before it when the amending Act VII of 1888 was passed. There is no special reason why, so far as temples and mosques are concerned, the word interest in S. 92 of the Civil Procedure Code, which by Clause 2 takes away the right of suit which worshippers had apart from S. 539 should bear a more restricted interpretation than in S. 14 of the Religious Endowments Act, which empowers any person or persons interested in any mosque, temple or Religious endowment to file a suit against trustees, managers and superintendents for any misfeasance, breach of trust or neglect of duty and gives wide powers to the Court to enforce performance of their duties and to make good the loss occasioned to the temple. It is true that no explanation corresponding to S. 15 of the Religious

1. (1881) I. L. R. 8 Cal. 32.
2. (1884) I. L. R. 11 Cal. 33.
3. (1888) I. L. R. 12 Mad. 157.
4. (1884) I. L. R. 7 All. 178.
5. (1887) I. L. R. 12 Bom. 247.
6. (1899) I. L. R. 24 Bom. 50. (P.C.)
7. (1897) I. L. R. 24 Cal. 418.

Endowments Act has been added to S. 92 but this is due to the fact that S. 92 is not confined to Hindu and Muhammadan religious and charitable trusts. So far as such trusts are concerned, it cannot be said that the two enactments are so different in scope as to render it unsafe to accept the meaning given to the word interest in Act XX of 1863, when similar questions arise under S. 92 of the Civil Procedure Code especially when the legislature deliberately omitted the word "direct" before the word "interest" by the Amending Act of 1888.

Rama-chandra Iyer v. Parames-waram Munbu.

Kumara-swami Sastri, J.

I am not unmindful of the inconvenience pointed out by the Chief Justice in holding that every Hindu wherever he may live has an intetest in a temple which he may never visit or worship in but the necessity of obtaining sanction of the Advocate-General or the Collector or other officer as the local Government may appoint coupled with the fact that a suit once filed would be conclusive and bind every worshipper would, I think, minimise any possible abuse. On the other hand it would lead to great difficulties, if it were attempted to lay down what the quantum of the interest required is to be which would be necessary to enable a person to file a suit under S. 92, if anything more than the right to worship is required.

I am of opinion that the right to worship in a particular temple is a sufficient interest to entitle a person to join in a suit under S. 92. In this view, Mr. T. R. Ramachandra Aiyar the 1st plaintiff, as a person whose right to worship in the suit temple is beyond doubt, has a sufficient interest and the District Judge erred in dismissing the suit on the ground of his want of interest. As my Lord takes a different view, the appeal will be dismissed with costs.

By the Court:—The appeal is dismissed with costs.

(On Appeal under clause 15 of the Letters Patent).

K. Srinivasa Aiyangar and P. R. Ganapathi Aiyar for appellants.

K. P. M. Menon, C. Madhavan Nair and *K. Govinda Marar* for respondents.

The Court delivered the following

Judgments:—*Abdur Rahim J*:—The sole question for determination in this Letters Patent Appeal is whether the suit in which it has arisen and which was instituted under S. 92 of the Code of Civil Procedure with respect to a temple in North Malabar is maintainable, the point being whether Mr. T. R. Ramachandra Aiyar, one of the plaintiffs, has an interest within the meaning of that section in the temple concerned. Mr. T. R. Ramachandra Aiyar who is a leading practitioner of this Court and a Brahmin resides in Madras while

Abdur Rahim, J.

Ramachandra Iyer v. Paramesswaram Munbu

Abdur. Rahim, J.

the temple is situate in Tellicherry. It is an ancient temple of some celebrity and is dedicated to the deity Sri Rama. Mr. T. R. Ramachandra Aiyar is a member of the Dharma Rakshana Sabah among whose objects is included institution of suits for the protection and due application of Hindu religious endowments. It also appears that when, on one or two occasions in the exercise of his profession he went to Tellicherry, he attended this temple and worshipped there, and it was further stated that he was likely to do so if he again went to Tellicherry. But the interest of Mr. T. R. Ramachandra Aiyar in this temple within the meaning of the Code is not supported on any of these facts but on his right as a Hindu to perform worship therein.

The question is one of considerable importance, and having given my best consideration to it, I have come to the conclusion that the view of the law expressed in the Judgment of Kumaraswami Sastri, J., is right. I think that the history of legislation on the subject makes it sufficiently clear that the legislature intended by the words 'having an interest in the trust' to include in the case of a temple or a mosque all persons having a right to perform worship or to say their prayers therein. It is not necessary to go back further than Act XX of 1863, an act which is expressly referred to in S. 92 of the Code of Civil Procedure itself and is still in force. That Act, as is well known, was passed primarily to enable the Government to divest itself of the direct management of Hindu and Muhammadan religious endowments which they had assumed under certain regulations. It also contains provisions for suits to secure the due administration of religious trusts by the trustees, managers or members of Committees. By S. 14 such right of suit is conferred on persons 'interested' in any mosque, temple or religious establishment. S. 15 then explains that the interest required in order to entitle a person to sue under the last preceding section *need not be a pecuniary or a direct or immediate*, interest or such an interest as would entitle the person suing to take any part in the management or superintendence of trusts. *Any person having a right of attendance*, or having been in the habit of attending at the performance of the worship or service of any mosque, temple or religious establishment, or of partaking in the benefit of any

distribution of alms shall be deemed to be a person interested within the meaning of the last preceding section.' It is probable that this elaborate explanation of what would be deemed to be sufficient interest to maintain a suit under Act XX of 1863 was considered necessary on account of the decisions under the Romilly's Act, such as *In re Bedford's Charities.*[1] Also it is clear that the Indian Legislature in 1863 did not think it would lead to undue harassment of trustees of religious foundations or to the institution of frivolous and vexatious suits, if persons entitled to worship in a temple or to say prayers in a mosque were vested with the right to institute suits to secure their proper management. Act XX of 1863 however applied only to religious foundations and the legislature deemed it advisable in the Civil Procedure Code of 1877 for the first time to make a specific provision for suits instituted for the purpose of remedying abuses relating to the administration of public charities generally. But by S. 539 of that Code only two or more persons having a 'direct' interset in the trust were given the right to sue provided they obtained sanction of the Advocate-General or the Collector for the purpose. The words 'direct interest' were repeated in the Code of 1882. This probably indicates that the Legislature in 1877 and 1882 in providing for suits relating to public trusts intended to assimilate the law to that of England as expounded by Lord Chancellor Eldon *In re Bedford's Charities*[1] and in *The Corporation of Ludlow* v. *Greenhouse*[2] though it does not follow that it intended any difference in the nature of the interest required to sustain an action with respect to the administration of religious foundations deemed to be sufficient under Act XX of 1863. Sir Samuel Romilly's Act 52 George III Chapter 101 which provided a summary remedy in cases of breaches of trust created for charitable purposes and for their proper administration gave to 'any two or more persons' the right to present a petition for the purpose. But it was nevertheless ruled by the Lord Chancellor that only persons having a direct or clear interest in the trust were competent to present a petition under the Act. *In re Bedford's Charities,*[1] certain Jews who were attending a synagogue in London were held not to

1. (1819) 2 Swans 471: 36 E. R. 696.
2. (1827) 1 Bligh N. S 17, S. C. 4 Eng. Reports page 780.

Ramachandra Iyer v. Parameswaram Munbu.

Abdur Rahim, J.

be persons who could present such a petition with respect to the Bedford Charities merely because being Jews they were interested on that account in obtaining a decision as to whether the poor Jews of Bedford were entitled to the benefit of the Charities which were founded for the education and relief of the poor inhabitants of Bedford. I do not find that any proposition can be deduced from the decision or observation of the Lord Chancellor in the above case or in the case of *Corporation of Ludlow* v. *Greenhouse*, [1] from which it can be properly inferred that persons having a right to attend a religious foundation for purposes of divine worship have not a sufficient interest, to maintain an action for its proper administration.

The interpretation of the phrase ' direct interest ' however led to a considerable conflict of decisions in the High Courts of the country. It is not necessary to go through them all. For our present purpose they are divisible into two groups, some supported the view that worshippers at a temple or a mosque were not persons having a direct interest, while others held that they had such interest within the meaning of the Code. The case of *Jan Ali* v. *Ramanath Mandul*, [2] was a leading decision of the former class. It ruled that worshippers or persons accustomed to say their prayers in a mosque were not within the purview of S. 539 as persons having a direct interest in the foundation. This ruling was followed by this High Court in *Narasimha* v. *Ayyan*. [3] The learned Judges here, in fact went further, holding that even the fact of the plaintiffs being managers of the temple in suit did not bring them within the provision of S. 539. The Allahabad High Court (in the case of *Jawahra* v. *Akbar Hussain*, [4] dissented from *Jan Ali's case* holding that every Muhammadan having a right to use a mosque for purposes of devotion was entitled to remedy, if the exercise of such right was interfered with, and that it was not even necessary for him to come under the provision of S. 30 of the Code of Civil Procedure, which deals with the right of suit by persons interested in obtaining relief or under S. 539 of the Code of Civil Procedure. Mahmood, J., added that even if S. 539 applied, Muhammadan worshippers who were entitled and accustomed to use it had the

1. (1827) 1 Bligh N. S. 17.
2. (1881) I. L. R. 8 Cal. 32.
3. (1888) I. L. R. 12 Mad. 157
4. (1884) I. L. R. 7 All. 178.

Ramachandra Iyer v. Parameswaram Munbu.

Abdur Rahim, J.

most direct interest in the foundation and were thus comprised within the purview of S. 539. It has been pointed out on behalf of the respondent that Mahmood, J., was speaking of worshippers that were accustomed to use the mosque. But Petheram, C. J., who delivered the judgment of the full Court relied entirely on a Muhammadan's right to attend a mosque in supporting the plaintiff's *locus standi* in that case and I feel sure that Mahmood, J., did not want to add any qualification to Petheram, C. J's., statement of the law. It is also suggested in the judgment of the learned Chief Justice in this case that the decision in *Jawahra* v. *Akbar Hussain*[1] proceeded on the provisions of Muhammadan Law. But with all respect, in order to ascertain whether a Muhammadan or a Hindu has an interest in a religious foundation, it is the Muhammadan or the Hindu Law that must be primarily looked into, and I have not heard any suggestion at the bar, that under the provisions of Hindu Law a Hindu having a right of attendance and worship at a temple has not an interest in that temple similar to what a Muhammadan has in a Mosque. In the Bombay High Court, Sargent, C.J., and Nanabhai Haridas, J., in *Chintaman Bagaji Deo* v. *Dhondo Ganesh Dev*,[2] expressed their dissent from *Jan Ali* v. *Ramnath Munda*[3] and held that the legislature did not intend by the expression direct interest an interest of a different nature from that which the worshippers and the devotees of a deity naturally have in the proper management of the temple (p. 623). That was also the trend of view of West and Birdwood, JJ., in *Manohar Ganesh Tambekar* v. *Lakshmiram Govindram*[4].

At this stage the legislature intervened to settle the controversy by removing the word 'direct' by the Amending Act, Act VII of 1888, S. 44. The effect of this amendment was fully considered by the Calcutta High Court in 1897 in the well-known case of *Sajedur Rafa Chowdhuri* v. *Gour Mohan Das Baishnav*,[5] where it was laid down: "The inference, therefore, is that the Legislature intended to allow persons having the same sort of interest that is sufficient under S. 14 of Act XX of 1863 to maintain a suit under S. 539; and this change in the law is, in our opinion, sufficient to distinguish the

1. (1884) I. L. R. 7 All. 178.
2. (1888) I. L. R. 15 Bom. 612.
3. (1881) I. L. R. 8 Cal. 32.
4. (1887) I. L. R. 12 Bom. 247.
5. (1897) I. L. R. 24 Cal. 418.

Ramachandra Iyer v. Parameswaram Munbu.

Abdur Rahim, J.

present case from that of *Jan Ali* v. *Ramnath Mundul* [1], which was decided before S. 539 had been amended by the omission of the word 'direct.'" This was a clear and explicit ruling that a person having a right of attendance and worship at a temple or a mosque had thereby an interest within the meaning of S. 539 in the Code of 1882 as amended by Act VII of 1888. The significance of that ruling cannot be whittled away by pointing out that the plaintiffs in that case had not only a right to worship at the temple concerned but were as a matter of fact also in the habit of performing worship there. I may also refer to a decision of this Court in *Ganapati Aiyyan* v. *Savithri Ammal* [2]. There it was held that two Brahmin residents of the neighbourhood who had obtained leave under S. 30 of the Code were entitled to maintain a suit, as representing the Brahmin community at large, for the removal of the trustee for the time being of a choultry founded for the benefit of the Brahmins. In his judgment, Shephard, J., observed :- "It has been repeatedly held in this country that such a suit as the present may be instituted by any member of the class intended to be benefited by the charity for the support and preservation of which the aid of the Court is invoked. According to the document which evidences the institution of the charity the class for which it was intended comprised Brahmins generally." It cannot be said that the interest of a person as member of a large and indefinite class entitled to the benefit of a charity if sufficient for the purpose of a suit under the provision of S. 30 will not be equally competent for a suit under S. 539.

We have not been referred to any decision in which the ruling in *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav* [3], was dissented from or doubted, and, so far as I am aware, it has always been understood to contain a correct exposition of the law. When therefore the Civil Procedure Code was redrafted in 1908, the legislature must be taken to have been aware of the interpretation that had been put on the words "having an interest in the trust." If that interpretation did not commend itself to the Legislature and if it intended to narrow the class of persons that could institute suits with respect to religious foundations it would have given some indication of its

1. (1881) I. L. R. 8 Cal. 32. 2. (1897) I. L. R. 21, Mad. 10.
3. (1897) I. L. R. 24 Cal. 418.

Rama-chandra Iyer v. Parames-waram Munbu.

Abdur Rahim, J.

intention. On the other hand it is in my opinion a fair and clear inference that the legislature in retaining the same expression intended to confirm the view expressed in *Sajedur Raja Choudhuri* v. *Gour Mohun Das Baishnav* [1], that the interest required need not be pecuniary direct or immediate or in any way different from that required by Ss. 14 and 15 of the Religious Endowments Act for purposes of suits relating to Hindu temples and Muhammadan mosques.

Considerable stress has been laid in support of the respondent's position on considerations of convenience, and such arguments were sought to be reinforced by a general reference to the law relating to the English Church though no authority at all supporting the respondent's position was cited. In my opinion, considerations of convenience are a very unsafe guide to the interpretation of a statute, especially so, in the case of an enactment like the one we are dealing with. At all events regard must in this connection be had to the provisions of Hindu Law and to customs and usages relating to Hindu temples, the nature of these foundations and the character of the worship and the services carried on there, the class of persons that resort to them, what special interests, if any, do the residents of the place in which the temples are situated, have and to what extent, persons residing in other parts of the Presidency or India generally are interested in their maintenace. What I mean will be made clear by briefly contrasting the constitution and the laws relating to the Church of England with those relating to religious foundations of Hindus and Muhammadans. The English Church has a regular and highly elaborate constitution. It is connected with the state and its administration is secured by an organization of a fixed and permanent character, governed by well defined rules and usages, enforcible in Courts specially constituted for the purpose. There is one peculiarity of English Ecclesiastical Law which alone would forbid the application of English notions in the determination of questions relating to a temple or a mosque. A Protestant Church is a parish Church. It is intended primarily for the spiritual benefit of the parishioners. The parish is a well defined ecclesiastical area and the parishioners have distinct rights and duties with respect to the parish church. They have

1. (1897) I. L. R. 24 C. 418.

Ramachandra Iyer v. Parameswaram Munbu.

Abdur Rahim, J.

a preferential right to accommodation during divine service and generally speaking, they alone are entitled to the services of the incumbent for the administration of Holy Communion, for solemnisation of marriages, to burial in the Churchyard and for the baptism of their children. The Church wardens and the members of the vestry are selected from the parishioners. The parishioners are bound to pay tithes or rather the rent charges into which they have been commuted. They contribute to the Church rates and are bound to pay fees for marriages, Churchings and burials and to contribute offerings during Easter. They are looked to for repair of the Church building and its fittings and under the Ecclesiastical Law they are even bound to attend divine worship on holy days. The rector is the incumbent of the parish. His remuneration consists of income derived from his benefice, ordinarily consisting of the tithes, glee-bland, parsonage house, Easter offerings and fees. The whole system in fact is parochial. Even most cathedral or collegiate churches belong in the Ecclesiastical Law to a parish.

On the other hand, the Indian Government as such has no duties or obligations in connection with the maintenance of Hindu temples and Muhammadan mosques. There is no ecclesiastical constitution or organisation for the administration of Hindu and Muhammadan religious establishments in any way analagous to that of the English Church. A Hindu temple or a Muhammadan mosque is not ordinarily intended, if ever, for the use of the residents of a particular village or town. The idea of any thing like a parish or parishioners is entirely alien to and has no meaning in connection with these places of worship. A temple or a mosque is founded in order to enable Hindus or Muhammadans generally or of a particular sect or persuasion to carry on worship or to say their prayers therein. They are maintained out of the income of the endowments if any and from free offerings and gifts or presents made by followers of the Hindu or Muhammadan religion not confined to any particular locality. No religious ordinance enjoining the attendance of Hindus or Muhammadans at their respective places of worship could be enforced by any recognised authority. I am not aware, and it has not been suggested, that Hindus or Muhammadans residing in the vicinity

Ramachandra Iyer v. Parameswaram Munbu.

Abdur Rahim, J.

of a temple or a mosque have any higher rights for any special duties connected with it different from those of their fellow Hindus and Muhammadans or members of the same sect, residing in any part of the Presidency or elsewhere. In the case of at least the larger temples in this Presidency, offerings, sometimes of a very valuable nature, are sent from all parts of the Presidency as well as from outside. The making of offerings is an important mode of worship in all Hindu temples and such offerings often are made by persons living at a distance. As regards a mosque, as its use consists in the saying of prayers therein, it can only be used by persons in a position to attend the mosque in person. But there are shrines in connection with tombs of Muhammadan saints, which in this connection bear analogy to Hindu temples. To these shrines offerings are sent by persons from all parts of India and the temples and shrines which receive offerings from distant places are not a few but numerous. The famous temples at Tirupati, Rameswaram, Srirangam and Madura in this Presidency and the temples at Benares and other sacred places of the Hindus, attract pilgrims in large numbers from the most distant places at stated festivals in the year. The well-known Muhammadan shrines such as at Ajmeer, Agra, Delhi and at Nagore in this Presidency are similarly resorted to by numerous Muhammadan pilgrims from all parts of the country. It is, to my mind, palpably repugnant to Hindu and Muhammadan religious consciousness that residents of the locality should alone be considered to have an interest sufficient to sustain a suit for the proper management of a temple or a mosque and none else and the utter untenability of such a notion becomes still more vivid to one's mind in the case of more the important institutions. I think the legislature of the country must have been persuaded of this fact when it gave the right to institute actions to secure proper administration of temples and mosques and their endowments by Act XX of 1863 to all persons who have a right of attendance and worship at these religious foundations and I cannot conceive that it intended by S. 539 of the old Code or S. 92 of the present Code to circumscribe within narrower limits the class of persons authorised to institute such suits. The provisions of the Code of Civil Procedure are not confined to purely religious institutions but cover all cases of religious and charitable

Ramachandra Iyer v. Parameswaram Munbu.

Abdur Rahim, J.

trusts and it was urged that if we construed them in the way contended for on behalf of the plaintiffs, the results would be startling. For instance, if there is a dispensary in a village in this presidency for the relief of sick persons generally, we should be compelled to hold that any two persons resident at Peshawar would be entitled to sue for administration of that charity under S. 92. That no doubt is a possibility but they would have to obtain the sanction of the Advocate General and that officer might be relied on not to grant leave except in a proper case. On the other hand from the history of the legislation in this connection, it seems to me clear that the legislature must have thought that as in India no authoritative organization or machinery existed for enforcing a due and proper administration of public trusts, the withholding of the right of suit from persons having an interest in the trust in the wide sense as defined in Act XX of 1863 with respect to religious foundations would be detrimental to numerous religious foundations and charities of the country. It was pointed out by way of answer that the Advocate-General can institute suits in cases where people of the locality are apathetic and indifferent. But it is common knowledge that most of such suits are in fact instituted by private persons and those instituted by the Advocate-General are rare and must necessarily be so in the present condition of things. On the other hand the trustees are in my opinion sufficiently protected from vexatious suits by the safeguards provided by the section.

Whether the interests of the plaintiffs in a particular foundation or public trust is sufficient to support an action under S. 92, may to some extent depend upon the facts of each case. But it must in my opinion be conceded as a sound general proposition that persons belonging to that section of the public for whose benefit a public trust has been created are in the position of beneficiaries and must as such be held to possess a sufficient interest to support a suit under the Code. In the case of a temple or a mosque persons entitled to attend there for purposes of worship and devotion are presumably the beneficiaries intended by the founder (See Sadasiva Iyer, J. in *Gopala Muppanar* v. *Dharmakartha Subramania Aiyar* [1]) and if such persons have not an interest in the institution within the

1 (1914) 27 M. L. J. 253 p. 258.

Rama-chandra Iyer v. Parameswaram Munbu.

Abdur Rahim, J.

meaning of law it is difficult to conceive who has. It is argued however that the interest contemplated by S. 92 must not be merely contingent or only a possibility as laid down in *Mohiuddin* v. *Saiyiduddin* 1. But in that case the learned Judges were considering the position of a person who had only a chance of succession to the office of the spiritual head of an institution while in this case Mr. T. R Ramachandra Aiyar in maintaining the suit relies on the right of attendance and worship already vested in him. The possibility that he may not often or ever, actually worship at the temple in question cannot in my opinion make any difference. On the other hand if a person is not entitled to worship at a particular temple he cannot by the mere fact of having actually worshipped there in the past on several or many occasions acquire a *locus standi* under S. 92. If the right of attendance and worship be not sufficient in itself the Courts would be called upon to enquire into questions as to the extent and mode in which a Hindu or Muhammadan suing under S. 92 of the Code of Civil Procedure observes his religious duties, how far he is in a position to resort to the temple or mosque in question and how often he actually goes there for worship or to investigate the nature and value of the offering, gift or presents made by a devotee and of other similar acts of devotion. In my opinion the Indian Legislature would ill like the Courts to embark upon such enquiries and that was probably why they took pains in Act XX of 1863 to explain the nature of the interest required and afterwards to omit the word 'direct' from the Code of Civil Procedure after the decision in *Jan Ali's case*. Further, if the respondents' arguments were sound, in cases where through a long course of misconduct or neglect on the part of persons in charge of a temple or mosque, it has ceased to be frequented for worship either owing to disrepair of the building or the trustees' default in maintaining the necessary establishment for due performance of the services or other similar causes—and such cases are not infrequent—there would be no one who would have a sufficient interest for purposes of a suit under S. 92.

As a mosque is dedicated to God in order that Muhammadans may say their prayers therein, so also a temple is dedicated to a particular deity in order that the worshippers of that

1 (1894) I. L. R. 20 Cal. 810.

Ramachandra Iyer v. Parameswaram Munbu.

Abdur Rahim, J.

deity may worship there. It follows that in the case of a mosque leaving out those rare cases, if any such exist, where the dedication is expressly limited—the followers of Muhammadan religion and in the case of a temple the Hindu devotees of the particular deity for whose worship a temple is founded are the beneficiaries intended by the founders. Suppose, there had been a deed of dedication with respect to the temple in suit, and that deed stated in so many words that Mr. T. R. Ramachandra Aiyar and all other worshippers of Sri-Rama would be entitled to worship there, it could hardly be contended then that Mr. T. R. Ramachandra Aiyar would not be a beneficiary of the trust and as such entitled to maintain the suit. It cannot in my opinion make any difference in this respect that there is no such deed of dedication available in this case, if, as is admitted, the temple in question was in fact intended for the use of worshippers of Sri Rama and Mr. T. R. Ramachandra Aiyar is a devotee of Sri Rama and as such entitled to worship in this temple.

I would therefore allow the appeal and remand the suit to the District Judge of North Malabar District for trial on the merits.

Oldfield, J.

Oldfield, J.:—Appellants are plaintiffs in a suit filed with the consent of the Advocate General against the trustees of a temple in Malabar under S. 92, Code of Civil Procedure ; and the question is whether one of them, to whom alone I shall refer as the appellant has the interest in the trust, which is required of a plaintiff by that provision. It is alleged that he has not, because he comes before us on the footing that he is a practitioner in this court who has worshipped in the suit temple only on two or three occasions, when he was in its nighbourhood on professional business, and has no particular expectation of ever doing so again. His right to worship there is disputed by respondents, but may be assumed for the present purpose, as (it is admitted) it might similarly be assumed in favour of every other Hindu of the higher castes ; and it is the sole qualification he alleges. The question is whether it involves his possession of the interest, which S. 92 requires.

Argument in his favour has been based largely on the assumption that S. 92 should be construed with reference to

Rama-chandra Iyer v. Parames-waram Munbu.

Oldfield, J.

Act XX of 1863 and by importation into it of the definition of an "interest" which S. 15 of that Act contains ; and, if the interest required is, in the words of the latter provision, to be " not necessarily direct or immediate " and may be claimed by "any person having a right of attendance...........at the performance of the worship" of the institution, then no doubt plaintiff has an interest. But although this construction was adopted in *Sajedar Rajah* v. *Gour Mohun Das Baishnav* [1] there is little in the details and history of the two provisions to commend it. True both deal with religious trusts and provide remedies for their mismanagement. But there the likeness between them ends; and until 1908 even that statement required material qualification. The Act applies to a particular class of religious institutions, those which were or could have been under the management of Government under Reg. VII of 1817 ; the Code did not originally apply in terms to religious trusts, and, whatever the original intention, it was only in 1882 that a reference to them as well as to charitable trusts was inserted. The Act remained unaltered since it was passed in 1863 and, although the Code was passed in 1877 and amended in 1882, 1888 and 1908, no exhaustive attempt was made to create or maintain similarity between the differing provisions of the one and of the other on any of these occasions. It was only in 1908 that the jurisdiction of Courts other than the District Court over suits under the Code was made possible, although they had exercised it under the Act from the beginning ; that the section of the Code was expressed as mandatory and that the right of suit under the Act was saved ; and that one relief, the removal of a trustee, obtainable under the Act from the beginning, but not, if the Full Bench of the Court decided rightly in *Rangaswami Naickan* v. *Varadappa Naickan* [2] under the code, was expressly provided for. Last and for the present purpose most important, the Act from the beginning contained the wide description of the interest, entitling to sue, on which appellant relies ; but the Code recognized only a direct interest, whatever that expression comprehends, until 1888, when the word " direct" was omitted. These amendments no doubt did in fact assimilate the Code to the Act on various points in succession; and some of them may have been made in consequence of

1. (1897) I. L. R. 24 Cal. 418. 2. (1894) I. L. R. 17 Mad. 462.

Ramachandra Iyer v. Parameswaram Munbu.

Oldfield, J.

decisions, in which the latter was referred to; in particular the last mentioned with reference to *Jan Ali* v. *Ramanath Mandal* [1]. But this spasmodic course of legislation does not indicate what in my opinion the material differences between the two statutes as they were enacted negative, a consciousness that the two were in *pari materia* or an intention that the one should be used as an aid to the interpretation of the other.

This conclusion is confirmed by reference to the character of the reliefs obtainable under the two statutes. In 1888, the crucial date for appellant's contention, because in it the interest required by the Code ceased to be qualified as direct, they differed essentially, the reliefs granted by it comprising only safeguards against future mismanagement; those granted by the Act only remedies for misfeasance in the past against trustees and managers, not alienees or other strangers to the trust; and naturally so, because the provisions in the former for appointment of new trustees and for a scheme were irreconciable with those in the latter for control and for appointment of trustees by elective committees. Whilst this distinction between the reliefs, which could be granted, was retained, there is no reason for supposing, what the code did not state explicitly, that the persons, who could claim them, were regarded as identical; and, if it cannot be shown that those persons were the same in 1888, there is none for supposing what again was not expressed, that they were intended to be the same in 1908, when provisions, explicable as natural improvements in this branch of the law and without reference to the Act, were introduced and the reliefs allowed by it were first made obtainable under the Code. I would respectfully associate myself with the suspicion, with which the learned Chief Justice regards the method of construction of one statute by reference to another, and would hold that in this case its employment is without justification.

The description in the Code until 1888 of the qualifying interest as direct is in fact the immediate basis of the majority of the decisions, to which we have been referred. For until that year, the question was always whether the plaintiff, who had some interest, had a direct one. Thus to give two

1. (1881) I. L. R. 8 Cal. 32.

instances, in *Jan Ali* v. *Ram Nath Mandul* [1], already referred to, plaintiffs where habitual worshippers in the mosque which was in question, and the Court, finding in Act XX of 1863 a distinction drawn between persons possessing a direct and immediate interest, and those who were merely in the habit of attending the worship, held that they had not the direct interest required; and in *Jawahra* v. *Akbar Hussain* [2], the existence of a direct interest in persons so situated was sustained, Mahmood, J., dissenting expressly from the Calcutta decision. To turn to the more important cases, those enumerated in the Judgment of the learned Chief Justice as decided after the omission of the word "direct," it is sufficient that, as he observes, the plaintiffs, who were allowed to sue, had in each an interest, which would have enabled them to proceed under Romilly's Act in England and had more than a mere right to worship. Closer reference is necessary only to two, which have been particularly relied on. In *Mohiuddin* v. *Sayiduddin* [3], the dictum that the interest must be an existing one and not a mere contingency at first sight is against appellant's contention. But the only contingency in question was the mere possibility of the plaintiffs' succession to the management of the institution which depended on circumstances beyond their control and in no way resembled the existing right of a potential worshipper, on which appellant relies. On the other hand, in *Sajedur Raja Chowdhuri* v. *Gourmohun Das Baishnav* [4] although the issue was stated as it has been in this appeal and the argument that the interest required must be different from a mere right to worship was rejected, the Court proceeded, firstly on the adoption of the definition of 'interest' in Act XX of 1863, from which I have dissented, secondly with reference to the decision in *Manohar Ganesh Tambekar* v. *Lakshmiram Govindram* [5] which in fact recognises the right to sue, not of mere worshippers, but of the manager of a temple and of priests who supervised the worship there of pilgrims, and thirdly on the finding that the plaintiffs had "a somewhat larger interest than that of mere worshippers"; and in these circumstances I do not feel bound by the conclusion. But, although the direct result of the authorities, even after 1888, is negative,

1. (1881) I. L. R. 8 C. 32.
2. (1884) I. L. R. 7 All. 178.
3. (1894) I. L. R. 20 Cal. 810.
4. (1897) I. L. R. 24 Cal. 418.
5. (1887) I. L. R. 12 Bom. 247.

Ramachandra Iyer v. Paramesvaram Munbu.

Oldfield, J.

indirectly they are strongly against appellant. For the fact that the wide construction he proposes has never been suggested during the last thirty years, although in every case it would have afforded a short ground of decision in the plaintiff's favour, is clear reason for doubting its correctness.

Apart from authority appellant relied mainly on the enumeration of alleged crucial instances, as admitting only of a decision consistent with his claim. But he did not show how any principle could be deduced from them; and, so far as they could be tested with reference to convenience, the result was against him, since, apart from considerations of *bona fides*, the possession of a mere right to worship affords no security for the plaintiffs' ability to propose a suitable scheme or later to see to its working. On the subject matter and language of the section it was suggested that the interest entitling to sue should be defined liberally to include such cases as appellant's, because the necessity for the consent of the Advocate-General or Collector will afford a corrective, where one is required. But that consent is merely a condition precedent to the institution of the suit and cannot affect the responsibility of the Court for the decision as to the plaintiffs' qualification. On the other hand no good reason has been shown against the interpretation of the word 'interest' in the section in the manner, in which it is ordinarily interpreted in other legal connections and in which I shall interpret it, as an interest, which is substantial and not sentimental or remote. This conclusion is consistent with the only cases cited, in which a merely potential right to claim the benefits of the trust was directly in question, *Corporation of Ludlow* v. *Greenhouse* [1], and *In Re Bedford Charities* [2], the former insisting on proof of a 'clear' interest, whilst the latter negatived the interest in a charity for the poor of one place alleged by persons, who were wealthy and lived in another.

The foregoing, of course, affords no immediate or explicit answer to the question as it was originally stated, whether a right to enjoy the benefits of a trust involves possession of the interest referred to in S. 92; and the assumption that such an answer must be possible underlay most of the agrument in favour of the comprehensive qualification, for which appellent contended. But there is no reason for assuming that an

1. (1827) 1 Bligh N. S. 17. 2. (1819) 2 Swans 470.

Rama-chandra Iyer v. Paramesaram Munbu

Oldfield, J.

answer to this or any other question of interpretation, which excludes considerations of degree or the necessity for enquiry into the facts of each case, can be found or should be looked for at the expense of established principle. And in practice such enquiry will present no difficulty. Proof of residence in the neighbourhood of the institution will no doubt be one way of establishing possession of an interest, not by any analogy with the rights of parishioners in England, but on the simpler ground that those who live near to the institution will be most likely to take advantage of its benefits. Other ways, however, will not be excluded; and therefore I am not troubled by the suggested cases of devotees, who may conceivably visit a shrine in the future, although there is no reason for expecting and no probability that they will ever do so; or of institutions, which have ceased to be frequented, because their services have been discontinued. In the first class of cases the grievance may fairly be described as sentimental: in the second the answer is that any two persons who can show at any time that they are prejudiced or have any well-founded expectation that they will be prejudiced by the discontinuance, will be entitled to sue; and in both classes it is possible that, if exceptional circumstances rendering a private suit impossible are established, the Advocate-General may be justified in the independent exercise of his powers. Such cases, however will be rare and usually it should be easy to ascertain whether even occasional visitors or pilgrims, actual or prospective, have a substantial interest, if the character and sphere of reputation of the institution, the area from which votaries come to it and the purposes for which they ordinarily come are considered. And in the present case it is unnecessary to pursue such considerations further. For they do not arise on the statement of appellant's position, which has been made. It involves that his interest is based on a mere possibility and is too remote to be substantial: and therefore, however laudable his motives or those of the Society, in which he holds office, his right to sue has not been established.

I would dismiss the Letters Patent Appeal with costs.

Coutts Trotter, J.

Coutts Trotter, J.:—This Letters Patent Appeal comes before us on a difference of opinion between my Lord the Chief Justice and my brother Kumaraswami Sastri in an appeal from the

Ramachandra Iyer v. Parameswaram Munbu.

Coutts Trotter, J.

District Judge of North Malabar. The suit was one under S. 92 of the Civil Procedure Code asking for the removal of the Trustees of a temple at Tellicherry and other kindred reliefs. The plaintiffs were a Nambudri Brahmin of North Malabar, as to whom no question arises, and Mr. T. R. Ramachandra Aiyar a well-known Vakil practising in these Courts. The learned District Judge dismissed the suit on the ground that Mr. Ramachandra Aiyar had no interest in the trust relating to the temple within the meaning of S. 92 of the Code of Civil Procedure. The learned Chief Justice agreed with his view and Kumaraswami Sastri, J., dissented from it. I find myself in entire agreement with the views of the former and only express my opinion in words of my own out of respect for the opinion of Kumaraswami Sastri and Abdur Rahim, JJ.

It is desirable to state the exact position of Mr. Ramachandra Aiyar in relation to this suit, and the facts are to be gathered from the learned District Judge's judgment. He is the vice-president of the Dharma Rakshana Sabha and is so described in the plaint. That is a body which interests itself in the conduct and management of temples in Southern India, but it is not contended that that fact would, of itself, give Mr. Ramachandra Aiyar any *locus standi* in this suit. His personal connexion with the temple is so slight as to be negligible. He is a native of Cochin, he lives in Madras and the utmost that can be said is that on two or three occasions the last of which was some eight or ten years ago, while visiting Tellicherry in his professional capacity, he took the occasion to worship in this temple. No one has seriously urged that so slender a connexion could be relied upon as creating any real interest in the temple, in the popular sense of that term. The proposition put forward is a much wider one, namely, that every Hindu has an interest, within the meaning of the section, in every Hindu temple throughout the length and breadth of India. The arguments that have been addressed to us appear to me to fall under three heads; first, the argument from the Indian decisions, secondly, the suggested analogy of Romilly's Act 52 Geor. III, Cap. 101 and the decisions under it, and thirdly the suggested analogy of S. 15 of the Religious Endowments Act of 1863.

In considering the decided cases it is no doubt important to remember and keep in mind the fact that S. 539 of the

Ramachandra Iyer v. Parameswaram Manbu

Coutts Trotter, J.

old Code stipulated that the relators should have not merely an interest but a 'direct' interest in the trust. By S. 44 of the Amending Act of 1888, the word 'direct' was omitted from S. 539 and it has not re-appeared in S. 92 of the persent Code. Accordingly, the cases decided before 1888 were applying a more stringent rule than can be applied at the present day in testing the *locus standi* of the relator. The Bombay cases *Manohar Ganesh Tambekar* v. *Lakshmiram Govindram* [1] and *Chintaman Bajaji Dev* v. *Dhondo Ganesh Dev* [2] do not help us much, because the interest there was so manifest as to be held by the Court; without difficulty, to be not merely an interest but a 'direct' interest, within the meaning of the old section. *Jawahra* v. *Akbar Hussain* [3], which was relied upon by Mr. Ganapathi Ayyar does not appear to me necessarily to support the position for which he contends, because the plaintiffs in that case lived in the village where the mosque in question was situated, habitually worshipped in the mosque and, moreover, had actually been obstructed in the attempt to perform their devotions in it. Mahmood, J., whose judgment has been relied upon by the appellants, describes the plaintiffs in that case as "personally entitled and accustomed to worship there." Of the Calcutta cases, in *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav* [4], the learned Judges, no doubt, express themselves as of the opinion that the 'right to worship' is sufficient to constitute an interest under the present section. I think that must be qualified by two considerations: the first is that the learned Judges, in my opinion, at page 427 completely distort the effect and scope of the decision in *Manohar Ganesh Tambekar* v. *Lakhmiram Govindram* [1]; the other is that in stating the position of the plaintiffs, they say this: "We may add that the two plaintiffs in the present case have a somewhat larger interest than that of mere worshippers, the plaintiff No. 1 alleging that he has for some time been performing some of the duties of the *Mohunt* and plaintiff No. 2, that he has been performing the *poojah* in the temple. These allegations have been supported by some evidence which is not contradicted." Now one would

1. (1887) I. L. R. 12 Bom. 247
2. (1888) I. L. R. 15 Bom. 612.
3. (1884) I. L. R. 7 All. 178.
4. (1897) I. L. R. 24 Cal. 418.

Ramachandra Iyer v. Parameswaram Munbu.

Coutts Trotter, J.

contend that the discharge of the duties of *Mohunt* and the performance of *poojah* did not constitute an interest, but, apart from those special facts, the use of the term 'mere worshippers' by the learned Judges, suggests, to my mind, that their view was not focussed on any distinction between *de facto* worship and the abstract and even unexercised right of worship—a distinction, which, for the purposes of this case, goes to the root of the matter. *Mohiuddin* v. *Saiyiduddin*, [1] is an express decision that the interest required under the section must be an "existing one and not a mere contingency." *Jan Ali* v. *Ramnath Mundul* [2], is an important case, because it is common knowledge that it was in consequence of that decision that the change in the law was made to omit the word 'direct.' The plaintiffs in that case lived in the village where the mosque was situated and were in the habit of worshipping regularly at that mosque. The Court, nevertheless, decided that they had not a direct interest in the mosque. I do not think that any of the Madras decisions have any direct bearing on the point we have to decide. *Gopala Muppanar* v. *Subramania Iyer* [3] is no doubt an authority for the proposition that every Hindu, with perhaps certain possible restrictions which I need not consider here, has a right to worship in every Hindu temple throughout India. I am not concerned, for the purposes of this case, with questioning that doctrine or the corresponding doctrine that every Muhammadan has a right to worship in every mosque in India, and perhaps in the whole world. I am not prepared to treat the observations of the learned Judges in *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav* [4] as compelling me to hold that the right to worship in a temple is equivalent to an interest within the meaning of S. 92 of the Civil Procedure Code.

I now pass to the argument put forward by the respondent based on the analogy of Romilly's Act and the two decisions *In re Bedford Charities* [5] and *Corporation of Ludolw* v. *Greenhouse*, [6]. Romilly's Act authorised any two or more persons to take proceedings under the Act in regard to the trust to which the Act referred, on obtaining the sanction of the Attorney-General, and the Act contains not a word to prescribe that they

1. (1898) I. L. R. 20 Cal 810
2. (1881) I. L. R. 8 Cal. 32.
3. (1914) 27 M. L. J. 253
4. (1897) I. L. R. 24 C. 418.
5. (1819) 2 Swans 470.
6. (1827) 1 Bligh. N. 817.

should have an interest, direct or otherwise. Nevertheless, Lord Eldon in those two cases expressed an emphatic opinion that the Court would not listen to a relator who had not an interest which he describes in one place as 'clear', and in another as 'direct'. As the section of the Civil Procedure Code is known, as a matter of history, to be based on Romilly's Act, I do not think this argument from analogy is one that can be overlooked.

Mr. Ganapathi Ayyar relied strongly on the definition of 'interest' contained in S. 15 of the Religious Endowments Act of 1863. S. 14 of that Act gives a right of suit, in certain matters, to "any person or persons interested in any mosque, temple or religious establishment, or in the performance of the worship or of the service thereof or the trusts relating thereto." S. 15 proceeds to define the requisite interest in two clauses, the first of which is negative and the second positive. The clauses are as follows :—

"The interest required in order to entitle a person to sue under the last preceding section need not be a pecuniary, or a direct or immediate, interest or such an interest as would entitle the person suing to take any part in the management or superintendence of the trusts."

"Any person having a right of attendance, or having been in the habit of attending, at the performance of the worship or service of any mosque, temple or religious establishment, or of partaking in the benefit of any distribution of alms, shall be deemed to be a person interested within the meaning of the last preceding section."

The important words are those in the second clause. If it be conceded that every Hindu has a right to worship in every temple, and the definition of S. 15 can be applied, as it stands, to the expression 'interest' in S. 92 of the Code of Civil Procedure, the appellants' chain of reasoning seems to me to be complete. I respectfully agree, in general, with the learned Chief Justice's observations as to the danger of taking a definition of an expression in one statute and applying it to the same expression in another. But I am constrained to admit that very special considerations apply to the case of these two particular statutes. In the first place they are *in pari materia*

Ramachandra Iyer v. Parameswaram Munbu.

Coutts Trotter, J.

dealing with practically the same subject matter. The argument goes even further than that and invites us to infer that the deliberate intention of the legislature must be taken to have been to assimilate the interest stipulated for in S. 92 of the Code of Civil Procedure to the interest defined in S. 15 of the Religious Endowments Act. The argument, as I follow it, is this: Before the amending section of the Act of 1888, S. 539 of the old Code required a direct interest in the relator. Then came the decision in 1882 in *Jan Ali* v. *Ram Nath Mundal*. [1] That case decided, as I have already pointed out, that the fact that the plaintiffs were residents of the village in which the suit mosque was situated and were regular worshippers at it, did not give them a direct interest in the trusts of the mosque. But it now becomes important to observe further that the learned Judges went on to express the opinion that the suit should have been instituted under S. 14 of the Religious Endowments Act of 1863—doubtless a clear intimation that in the opinion of the learned judges, the relators had an interest within the meaning of that section, though not a direct interest. The draftsman of the amending section of the Act of 1888, we are to suppose, set himself to the task of so amending the law that persons in the position of the plaintiffs in *Jan Ali* v. *Ram Nath Mundal* [1] should be enabled in future to sue under the section of the Civil Procedure Code. He had before him the section of the Religious Endowments Act and the opinion of the learned Judges in Calcutta that the plaintiff had an interest within the meaning of the section of the Religious Endowments Act. When he omitted the word 'direct' is it not most natural to suppose that he intimated that the expression 'interest' in the amended Code should have the same meaning as in the Religious Endowments Act? I think this is a most cogent argument and would yield to it but for one reason. Assuming that the words of the Religious Endowments Act, if it applied, would cover the case of the present plaintiffs, I have no manner of doubt that such a result was not in the least in the contemplation of the draftsman of the Religious Endowments Act and that such a result from the wording of the definition would have been regarded as startling by everybody at the time. I think that is sufficient warrant for refusing to import the

1. L. R. 8 Cal. 32.

definition contained in the one Act into the other. However close the historical connection between the two sections may be, the very fact that the words used in one may lead to an inconvenient and unforeseen conclusion is, it seems to me, good reason for refusing to import those words and producing the same conclusion in the other.

Numerous illustrations were put during the course of the argument to show the difficulties involved on one side or the other. The inconvenience and, to my mind, the absurdity of the proposition that any two Hindus, residing say in Peshawar can be said to have an interest in a temple in Malabar, by virtue merely of being Hindus, with the right to worship in that temple if they should ever find themselves in its vicinity, is apparent from its mere statement. On the other side, it was pressed upon us that, if that proposition in its extreme width be rejected, it is impossible to draw a line of demarcation. Hindu and Muhammadan Law know nothing of territorial boundaries of temples or their priests or of anything corresponding to the idea of a parish with special local rights in its parishioners, which would easily solve the difficulty in the case of an English Established Church. In so far as the decided cases suggest a limitation, the limitation suggested is that of living in the neighbourhood of the institution in question and habitually resorting thereto for purposes of worship. On that, one can be asked, what is your definition of neighbourhood ? What is your definition of habitual resorting ? On that I am prepared at once to admit that I can find no words that would solve those difficulties by a universally applicable formula. But I do not think that concludes the matter. I am content to say that the task is impossible, that the most that can be done, or attempted to be done, is to say that the interest required by the statute to reside in the relator must be, in the words of Lord Eldon " clear " or in the words of the learned Chief Justice in this case, "a present and substantial, and not a remote and fictitious, or purely illusory interest," or, in the words of the learned Judges in *Mohiuddin* v. *Sayiduddin* [1] " an existing interest and not a mere contingency." Beyond that, it seems to me that the question as to whether any given person has or has not an interest, as so defined, is a pure question of fact

1. (1894) I. L. R. 20 Cal. at page 817.

Ramachandra Iyer v. Parameswaram Munbu.

Coutts Trotter, J.

and must be left to the Court, before whom he appears to decide in the light of these general principles on a consideration of the particular circumstances of each case. I see nothing to regret in such a conclusion and do not feel perturbed at my own or any one else's inability to construct a logical bed of Procrustes to fit each and every imaginable case. No doubt there are cases of special difficulty, such as the great pilgrimage temples at Benares and other sacred places, where the majority of the worshippers come from all over India. The extreme case perhaps is the temple of Rameswaram in this presidency, which is situated on an island, and no one lives near it except those connected with the carrying out of the religious worship in the temple, and the worshippers are exclusively pilgrims. It is urged that, if you are to put a construction on the section which in any way confines the right of suit to local or habitual worshippers, not one of the thousands who attend the temple would fulfil the requirement. If it be so, I do not shrink from the conclusion. S. 92 of the Code does not confine the right of suit to relators but gives a right of suit to the Advocate-General himself directly. As guardian of the religious interests of the community as a whole he could doubtless be relied upon to take proper steps for the due administration of those religious establishments which are more the resort of the public at large than of the residents in their immediate neighbourhood. I am, therefore, of opinion that there is nothing which compels me to adopt the wide proposition contended for by the appellants with its results so directly opposed, as I think, to convenience as to make the position of temple trustees an intolerable one.

I, therefore, agree with my lord the Chief Justice and my brother Oldfield in dismissing this appeal with costs.

A. V. V.

PRIVY COUNCIL.

PRESENT :—LORD BUCKMASTER, LORD DUNEDIN, SIR JOHN EDGE AND SIR LAWRENCE JENKINS.

[On appeal from the Court of the Resident at Hyderabad, Deccan.]

The Firm of Sadasuk Janki Das ... *Appellants.* *

v.

Maharaja Sir Kishan Pershad Bahadur and another. .. *Respondent.*

P. C.

Firm of Sadasuk Janki Das *v* Sir Kishan Pershad Bahadur.

Negotiable Instruments—Agent's liability on a Bill of Exchange—Name of person to be charged upon a negotiable instrument must be clearly stated in such instrument as party thereto—Otherwise signatory is personally liable—Undisclosed principal cannot be made liable—Does the Indian Law differ from the English—Bills of Exchange Act, S. 26 (1)—Negotiable Instruments Act, 1881 (*Act XXVI of* 1881) *Ss.* 23, 26, 27, 28.

The name of a person or firm to be charged upon a negotiable document must be so stated in the document itself as to make it clear on any fair interpretation thereof that he is the person liable upon it.

In an action on a bill of exchange or promissory note against a person whose name properly appears as party to the instrument it is not open either by way of claim or defence to show that the signatory was in reality acting for an undisclosed principal.

Appeal from a decree of the Resident of Hyderabad, dated September 27, 1915, reversing a decree of the First Assistant Resident at Hyderabad and restoring that of the trial Court, the District Court of Secunderabad.

The defendant No. 2, Mohan Lal, drew in favour of the appellants a series of hundis; each of these began with the heading

"By order of Sirkar may his happiness increase"

to

"Mohan Lal son of Hira Lal."

Each was signed by defendant Mohan Lal with the addition to his name of "Acting Superintendent of the Private Treasury of His Excellency Sir Maharaja, the Prime Minister of H. H. the Nizam," and was accepted by Mohan Lal.

The appellants sued both the Maharaja and Mohan Lal upon the hundis. The Maharaja denied Mohan Lal's authority to draw the hundis on his behalf and further pleaded that he was not liable on the hundis as his name was not disclosed as principal. On this latter ground the trial Judge dismissed the suit against the Maharaja while decreeing it against Mohan Lal. Plaintiffs appealed to the First Assistant Resident, who held that they had a cause of action against the Maharaja, and remanded the suit under O. 41 R. 23 for trial of an issue whether the Maharaja had received credit for the money for

* 1st November, 1918.

P. C.

Firm of Sadasuk Janki Das v. Sri Kishan Pershad Bahadur.

which the hundis were drawn. The Maharaja appealed to the Resident who held the second defendant only liable. The material part of his judgment was as follows :—

"If we look merely at the instruments concerned and interpret S. 28 strictly without any reference to outside evidence or to the circumstances of the parties concerned there can be little doubt I think that the authorities are all in favour of the first defendant and that second defendant is strictly liable for the debts incurred. To quote the notes to S. 28 in Bhashyam and Adiga 'This section is based upon the following dictum of Lord Ellenborough. Is it not a universal rule that a man who puts his name to a bill of exchange thereby makes himself personally liable unless he states on the face of the bill that he subscribes for another, which are words of exclusion? Unless he says plainly I am the mere scribe, he is liable'.

"And again, in order to exclude personal liability an agent should indicate on the negotiable instrument either that he signs as an Agent or that he does not intend thereby to incur any personal liability. Mere signing "as Agent" will not be sufficient to indicate that the person signs as agent only. The words "as agent" will be held as merely descriptive."

"Again 'Knowledge of agency to the other party does not free the agent from liability, if he does not disclose on the instrument that he signed as Agent.' Such additions as Agent, Manager, etc., to a signature are regarded as mere *designatio personae.*

"These arguments if strictly applied in the present case are unanswerable. Second defendant has nowhere said distinctly that he signs as agent, nor does he say that he does not intend to incur personal responsibility. His designation of himself as Acting Superintendent, etc., is a mere designation and nothing more, and the words 'By order' could be added by any one wishing to borrow money and does not necessarily bind any one who is not definitely mentioned as the principal party to the instrument.

"But there is an important qualification to all this and we must consider how this qualification may possibly modify a strict interpretation of this section. This has been hinted at in what I have set down above in Mr. Asghar's argument No. (4). He maintains, on good authority no doubt, that in commercial law the instrument must speak for itself and outside evidence is inadmissible to charge any person as a principal party. But the authority on which I understand he relies mainly, adds the important exception 'unless his (the principal party's) name is in *some way* disclosed on the instrument itself'. This is on page 99 Bhashyam and Adiga. Again on page 108 it is stated. If there is an ambiguity in the instrument with reference to the fact whether the

P. C.

Firm of Sadasuk Janki Das v. Sir Kishan Pershad Bahadur.

agent signed as agent of the principal or not, evidence is always admissible to show the character in which the agent signed. The question whether an agent signed for himself or on behalf of the principal is a question of fact to be determined in each case upon the evidence (See also *Muthar Sahib Marakayar* v. *Kadir Sahib Marakayar*. [1])

"This is the only line of defence that could possibly have had any bearing on the case and it is a pity that Mr. Ayyangar for the Respondent plaintiff did not confine himself to this argument and bring it out more clearly. But I am afraid that the law and the authorities would have been against him even on this point, for in order that this question of evidence should hold good, it is quite evident that defendant No. 2 should have signed himself *as agent.* This, however, does not appear on any of the documents concerned. He signs his name and then merely describes who he is. This is not sufficient to give him the benefit of producing evidence to show that he is acting for some one else, and that he is not personally responsible. To my mind the law is perfectly clear and if the plaintiff failed to draw up an instrument on which he could sue the first defendant in proper legal form he alone is responsible.

"I cannot help regretting that I am obliged to reverse the order of the lower Appellate Court. It seems on the face of it absurd that 2nd defendant, a mere man of straw, should have borrowed all this money on his own account and there is little doubt that plaintiff understood that he was lending money to the Maharaja and not to the Superintendent of his Treasury pesonally. But all that is really beside the point and in order to come to a right decision on a question of this kind, on which the law is quite clear, one has to be careful not to allow one's personal acquaintance with the parties concerned and with local circumstances to cloud the issue. Whatever may be thought privately about the Maharaja's indebtedness and about the real facts of this case, there can be no doubt of the propriety and reasonableness of the law as applied to a case of this kind. Any one holding office as Superintendent of a Treasury or in any other capacity could borrow money from a Sahukar and say it was for his master, and it is only fair that he should be personally responsible for the loan unless he makes it quite clear on the instrument which he signs that he is only acting as agent for his master. In the present case there is no such clear indication and leaving aside all personal prejudices and predilections there is really no reason to suppose that 2nd defendant may not have used his influence as the Minister's official to borrow the money either for his own personal use or to cover up some irregularity he may have committed in connection with his master's Treasury accounts. The case only shows how careful money

1 (1905) I. L. R. 28 M. 514.

P. C.

Firm of Sadasuk Janki Das v. Sir Kishan Pershad Bahadur.

lenders should be about advancing large sums of money without proper security. As to the 2nd defendant if he is being unjustly or dishonourably treated by 1st defendant, that is his affair and he must seek his own remedy in the proper Court. I therefore accept the appeal in both cases and decide that the orders of the lower Appellate Court be set aside and the decrees of the first Court be restored with costs against respondents.

A. F. Pinhey, Lieut-Colonel,
Resident.

Hence this appeal.

Sir Erle Richards, K. C. and *Kenworthy Brown* for appellants submitted that the Maharaja was liable. There is a difference between the English and the Indian Law. Under S. 26 (1) of the Bills of Exchange Act 1882, it is necessary that the agent should add to his signature words describing him as an agent or as filling a representative capacity. S. 28 of the Negotiable Instruments Act does not require this. It is sufficient that the agent should indicate any where in the bill of exchange that he signs 'as agent.' The words " by order or Sirkar" are a clear indication to that effect. (Reference was made to *R. P. Koneti Naicker and others* v. *J. Gopala Aiyar* [1].)

The respondents did not appear.

Their Lordships' judgment was delivered (1st November 1918) by.

Lord Buckmaster.

Lord Buckmaster :—On the 14th April 1910, Mohan Lal borrowed from the plaintiff's, who are the appellants on this appeal, the sum of Rs. 35,000, and to secure repayment drew and accepted in their favour fourteen *hundis*—each for the sum of Rs. 2,500—the first payable ten months after the 14th April, 1910, and the remainder at successive intervals of one month. Each *hundi* was in the same form, and it is agreed that the true translation is as follows :—

" By order of Sirkar may his happiness increase.

to

Mohan Lal, son of Hira Lal.

Six months from the date of the execution of this *hundi*, please pay to Seth Sadasuk Janki Das Sahu of the Residency Bazars or to his order the sum of H. S. Rs. 2,500 (half of which is Rs. 1,250) which sum I have received in cash in the Residency Bazars from the said Seth Sahib.

Dated 3rd Rabi us sani 1328 H (14th April, 1910).

Mohan Lal (In (Urdu),

1. (1913) I. L R. 38 Mad. 482=25 M. L. J. 425.

Acting Superintendent of the Private Treasury of His Excellency Sir Maharaja, the Prime Minister of H. H the Nizam.

[On the back]

This *hundi* has been accepted by Mohan Lal. son of Hira Lal, in favour of Seth Sadasuk Janki Das, inhabitant of the Residency Bazars Hyderabad.

Dated 3rd Rabi us-sani 1328. Hijri. Mohan Lal (In Urdu)

The whole of the *hundis* were dishonoured, and the appellants accordingly took proceedings on the 15th of August, 1913, against Mohan Lal and the Maharaja Sir Kishan Pershad Bahadur, the respondents on this appeal, claiming the amounts due upon the *hundis* with interest. It would, of course have been open to the plaintiffs had they thought fit to have framed their case in an alternative form, and to have sued both on the *hundis* and alternatively upon the consideration.

It is indeed urged by the appellants that the plaint in fact embraced both these forms of relief, but their Lordships are unable to accept this contention, which does not appear to have been raised in the Courts below. In their opinion the plaint was confined to an action brought upon the *hundis* themselves, and the sole question for decision upon this appeal is whether upon the form of the *hundi* the first respondent, the Maharaja, was properly included as a defendant to the suit, or whether as against him the claim is demurrable.

The District judge on the 19th September, 1914, dismissed the suit against the Maharaja, but passed a decree against Mohan Lal. The plaintiff appealed from this judgment to the First Assistant Resident at Hyderabad who, on the 28th April, 1915, reversed the judgment of the District judge and remanded the case to be disposed of on the merits, holding that the *hundis* were drawn in a form sufficient to charge the Maharaja upon these if agency were proved ; but this judgment was reversed by the Resident at Hyderabad on the 27th September, 1915, and from this judgment the present appeal has been brought.

The real point for decision is whether the *hundis* have been so drawn that in form they bind the Maharaja. If they have, it will then become necessary to determine whether in fact Mohan Lal had authority for the purpose. If they have not, this question of agency does not and cannot arise in the persent suit.

P. C.

Firm of Sadasuk Janki Das v. Sir Kishan Pershad Bahadur.

Lord Buckmaster.

Now, in the actual operative part of the *hundis* there is nothing by which the Maharaja can be bound. Each one is drawn in the name of Mohan Lal alone, and accepted by him without qualifiation, for the addition of the words, "Acting Superintendent of the Private Treasury of His Excellency Sir Maharaja, the Prime Minister of H. H. the Nizam," is, in their Lordships' opinion, nothing but a description of Mohan Lal's position, and is certainly not a signature in the form necessary for an agent signing on a principal's behalf.

The appellants, however, place great reliance on the preliminary words :—" By the order of Sirkar may his happiness increase," and contend that such a preface to the instrument implies that subsequent signatures are signatures on behalf of the Sirkar.

Their Lordships cannot accept this contention. It is of the utmost importance that the name of a person or firm to be charged upon a negotiable document should be clearly stated on the face or on the back of the document, so that the responsibility is made plain and can be instantly recognised as the document passes from hand to hand. In this case the preliminary words mention no more than that Mohan Lal has been directed to execute the *hundis*, and they do not necessarily imply that he has been clothed with authority to execute them in any other form than that in which they were actually prepared—a form which it has already been shown consitituted nothing more than a personal liability on behalf of Mohan Lal.

The statement, to which reference has been made, which appears on page 9[?] of Messrs. Iyenger and Adiga's book on Negotiable Instruments, that "outside evidence is inadmissible on any person as a principal party unless his—the principal party's—name is in some way disclosed in the instrument itself," is not in itself an adequate statement of the law. It is not sufficient that the principal's name should be "in some way" disclosed, it must be disclosed in such a way that on any fair interpretation of the instrument his name is the real name of the person liable upon the bill.*

Their Lordships' attention was directed to Ss. 26, 27 and 28 of the Negotiable Instruments Act of 1881, and the

* See also Page 145 Bhashyam and Adiga's Negotiable Instruments Act. Second Edition 1918 (Ed).

terms of these sections were contrasted with the corresponding provisions of the English Statute. It is unnecessary in this connection to decide whether their effect is identical. It is sufficient to say that these sections contain nothing inconsistent with the principles already enunciated, and nothing to support the contention, which is contrary to all established rules, that in an action on a bill of exchange or promissory note against a person whose name properly appears as party to the instrument it is open either by way of claim or defence to show that the signatory was in reality acting for an undisclosed principal.

P. C.

Firm of Sadasuk Janki Das v. Sir Kishan Pershad Bahadur.

Lord Buckmaster.

The Judgment of the Resident appears to their Lordships to place the correct interpretation upon the documents in this case, and to state accurately the principles of law that are to be applied. For this reason they think that the appeal must fail, and they will humbly advise His Majesty that it should be dismissed.

Solicitor for Appellants :—*Douglas Grant.*

A. P. P.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE OLDFIELD AND MR. JUSTICE SESHAGIRI AIYAR.

Arumugam Asari ... *Petitioner* (Plaintiff)*

v.

Gurunatha Asari ... *Respondent (Defendant)*

Small Causes Court—Order under S. 95 C. P. C.—Appeal—Maintainability.

No appeal lies against an order passed by the Judge of a Court of Small Causes under S. 95 of the Code of Civil Procedure *Karumaru Venkataswami* v. *Lanka Tripuriah* 1 dissented from.

Arumugam Asari v. Gurunatha Asari.

Petition under S. 104 (g) of Act V of 1908, praying the High Court to revise the Judgment and decree of the Court of Small Causes, Trichinopoly, in S. C. S. No. 5110 of 1917.

T. R. Vaidyanatha Aiyar, for Petitioner.

A. Ramaswami Aiyar, for Respondent.

The Court delivered the following

Judgment :—The Appeal is filed against an order passed by the Judge of a Court of Small Causes under S. 95 of the Civil

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* C. R. P. No 62 of 1919 10th February, 1919.
[Originally A. A. O. No. 230 of 1918. Converted by order of Court in C. R. P.]

1. (1914) 26 I. C. 389.

Arumugam Asari v. Gurunatha Asari.

Procedure Code. We have not been shown any reason for departing from the general principle that no appeal lies against an order passed on the Small Cause side and we dissent from the decision to the contrary effect in *Karumaru Venkataswami v. Lanka Tripuriah.* [1]

We have been asked, if no appeal lies, to deal with the matter in the exercise of our revisional powers. But the Lower Court's decision is in our opinion correct.

The Civil Revision Petition is dismissed with costs.

A. S. V.

THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR JOHN WALLIS, CHIEF JUSTICE AND MR. JUSTICE AYLING.

The Secretary of State for India in Council, *Appellant* * through the Collector of Ramnad at Madura (*Defendant*).

v.

The Hon'ble B. Raja Rajeeswara Sethupathi *Respondent* *alias* Muthuramalinga Sethupathi Avergal, (*Plaintiff*). Rajah of Ramnad.

The Secretary of State for India v Raja of Ramnad.

Madras Proprietary Estates Village-Service Act (II of 1894) S 22—Annual rent value fixed by Tahsildar—Demand illegal—Payment under protest—Right to recover.

The annual rent value of an estate for the purposes of S. 22 of Madras Act II of 1894 was fixed not by the Revenue Officer in charge of the division but by his subordinate, the Deputy Tahsildar. There was nothing to show that the latter's calculation was adopted by the former as his own. The proprietor paid the sum demanded by the Tahsildar under protest and sued for its recovery from the Government.

Held, that the omission of the officer of Government to comply with S. 22 of Madras Act II of 1894 rendered the demand illegal and that the proprietor was therefore entitled to recover the amounts paid by him.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Ramnad in Original Suit No. 22 of 1917.

The Government Pleader (V. Ramesam,) for Appellant.

K. Srinivasa Aiyangar and *R. Krishnamachariar,* for Respondent.

The Court delivered the following

Judgment:—The result of the evidence is, as found by the Subordinate Judge, that the annual rent value of the estate was

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* A. S. No. 194 of 1918. 19th February, 1919.

1. (1914) 26 I. C. 389.

The Secretary of State for India v. Raja of Ramnad.

not fixed for the purpose of the Act by the Revenue Officer in charge of the Division as provided in S. 22 of the Madras Proprietary Village Service Act, but by his Subordinate, the Deputy Tahsildar, nor is there any evidence to show that the Deputy Tahsildar's calculation was adopted by the Revenue Officer in charge of the Division as his own.

The Deputy Tahsildar's demand was made in Exhibit C—1, dated 18th April 1913, and the money was paid by the Rajah under protest on 4th and 6th August 1915, and he now sues to recover it back on the ground among others, that the demand was illegal owing to the failure of the Officers of Government to comply with the provisions of the section. We agree with his contention and dismiss the appeal on this ground with costs.

A. V. V.

PRIVY COUNCIL.

PRESENT :—LORD BUCKMASTER, LORD DUNEDIN, SIR JOHN EDGE AND SIR LAWRENCE JENKINS.

[From The High Court of Judicature at Bombay.]

Rachappa Subrao Jadhav Desai ... *Defendant** (*Appellant.*)

v.

Shidappa Venkatrao Jadhav Desai ... *Plaintiff* (*Respondent.*)

P. C.

Rachappa Subrao Jadhav Desai v Shidappa Venkatarao Jadhav Desai.

Jurisdiction—Valuation of suit—Notional as distinct from real value of subject-matter of suit—Whether it affects jurisdiction—When objection to jurisdiction should be taken—Special jurisdiction of Subordinate Judges in Bombay—Court Fees Act, 1870 (Act. VII of 1870) Ss. 6, 7—Suits Valuation Act 1887 (Act VII of 1887) S. 8—Bombay Civil Courts Act, 1869 (Act. XIV of 1869) Ss. 24, 27—Practice of valuing prayer for declaratory decree at Rs. 130 condemned.

Objections to jurisdiction should be taken at the earliest possible moment.

When a notional value, different from the real value, is placed upon property for the purposes of the Court Fees Act, such notional value cannot displace the real value for the purposes of jurisdiction.

The Court Fees Act has no other object than to secure revenue and its provisions should be construed accordingly.

The practice which has grown up in Bombay of valuing a prayer for a declaration at Rs. 130 (as being the value on which the fee nearest to Rs. 10 would be leviable) has no warrant in law and is inconvenient.

Appeal from a decree of the Bombay High Court dated December 10, 1913, affirming a decree of the First Class Subordinate Judge of Belgaum, and from an order of the High Court, dated June 26, 1912, which set aside for want of jurisdiction a decree passed by the District Judge of Belgaum reversing the Subordinate Judge's decree.

* 25 and 28th October, 1918.

P. C.

Rachappa Subrao Jadhav Desai v. Shidappa Venkatarao Jadhav Desai.

The vital issue in this case was one of fact, whether the respondent had been validly adopted. The prayers of the plaint are set out in their Lordship's judgment. The First Class Subordinate Judge found the adoption proved and decreed the suit. In his Court no question of jurisdiction was raised and the only contest was on the merits. Defendant preferred two appeals, one to the District Court and one to the High Court: the latter was subsequently withdrawn. In the District Court, respondent took a preliminary objection that the appeal lay to the High Court, as the First Class Subordinate Judge could only have entertained the suit in his special jurisdiction. The District Judge overruled this objection and heard the appeal on the merits. He held that the respondent had not been validly adopted, reversed the Subordinate Judge's, decree, and dismissed the suit. Plaintiff appealed to the Bombay High Court, where the following judgment was delivered by Chandavarkar and Batchelor, JJ:

Judgment :—This "appeal arises out of a suit which had been brought by the present appellant in the Court of the Subordinate Judge, First Class, Belgaum, for a declaration that he was the adopted son of one Venkatrao deceased, and that as such he was entitled to his property.

The plaint was valued at Rs. 135 for a declaration of the right, and at Rs. 69,016-9-0 for pleaders' fees. The plaintiff alleged in the plaint that a house forming part of the subject-matter of the property was in the possession of "the plaintiff himself and that the defendant was obstructing him. He prayed for an injunction to issue restraining the defendant from interfering with the plaintiff's rights in respect of that house. The injunction was valued at Rs. 5. The plaintiff further alleged that the rest of the property, belonging to the deceased Venkatrao and valued at Rs. 69,016-9-0, was in the possession of the Collector, having been attached by him after the death of Venkatrao. As to that property the plaintiff sought a bare declaration of his right as Venkatrao's adopted son. As all the property was, partly in Athni and partly in Chikodi, and, therefore, outside the ordinary jurisdiction of the Subordinate Judge's Court at Belgaum, that Court could try the suit only under its special jurisdiction.

"The Subordinate Judge tried the suit under his special jurisdiction and held that the appellant was the adopted son of Venkatrao. A decree was accordingly passed in favour of the plaintiff.

The defendant appealed to the District Court at Belgaum. There a preliminary objection was raised by the present appellant who was respondent in the appeal, that the appeal lay not to the District Court but to this Court, because the suit had been tried in the

P. C.

Rachappa Subrao Jadhav Desai v. Shidappa Venkatarao Jadhav Desai.

Court of the Subordinate Judge at Belgaum under that Court's special jurisdiction. The learned District Judge held that the Subordinate Judge, First Class, at Belgaum, had no jurisdiction to try the suit under his special jurisdiction, because the suit having been for a declaration with consequential relief and the relief having been valued at Rs. 5, for the purposes of Court-fee, the valuation for the purposes of jurisdiction was the same as that for the purposes of Court-fee and that valuation was less than Rs. 5,000, according to the decision of this Court in *Vacchani* v. *Vacchani* (1).' The District Judge was also of opinion that the Subordinate Judge had no jurisdiction to try the suit under his ordinary jurisdiction because the property to which the suit related was outside that jurisdiction. Nevertheless the District Judge held that he had jurisdiction to dispose of the appeal on the merits because neither party "hinted that he had been prejudiced by the lower Court's erroneous assumption of jurisdiction." The District Judge found the adoption set up by the plaintiff not proved and disallowed his claim.

From that decree this second appeal has been filed. The principal contention in support of the second appeal is that the suit was within the special jurisdiction of the Subordinate Judge, First Class, Belgaum, and that therefore, an appeal from his decree lay, not to the District Court, but to the High Court.

The appellant's argument is as follows: the suit comprised two subjects—(1) property in the custody of the Collector, of the value of more than Rs. 5,000 and (2) property in the plaintiff's possession of the value of less than Rs. 5,000. Plaintiff asked for a bare declaration of title as to the former; as to the latter he asked for a declaration with consequential relief, valued at Rs. 5. Though the latter relief was of a value less than Rs. 5,000, the former exceeded that value; hence the suit was within the special jurisdiction of the subordinate Judge, First Class, at Belgaum.

It has been argued for the respondent that as this was a suit for a declaration with a consequential relief and the consequential relief had been valued at Rs. 5, the suit must be treated as one for a declaratory decree with consequential relief and that, therefore, the valuation having been less than of Rs. 5,000, the suit lay in the First Class Subordinate Judge's Court at Belgaum under its ordinary jurisdiction.

But that is not the correct view to take of the plaint. In the plaint, the appellant distinctly states that he laid claim to two subjects, *i.e.*, two kinds of properties. First, there was property in the possession of the Collector and its value exceeded Rs. 5,000. That property having been in the possession of the Collector, it was not

1. (1908) I. L. R. 33 Bom. 307.

P. C.

Rachappa Subrao Jadhav Desai v. Shidappa Venkatarao Jadhav Desai.

necessary for and allowable to the plaintiff to ask for an injunction. He was entitled to ask only for a declaration of his title. Then there was the other subject-matter of the suit, namely, the house as to which the plaintiff was entitled to ask for a declaration and consequential relief. With reference to this second subject-matter, it was open to the plaintiff to put his own valuation on the plaint, and he did it, and if the suit had been confined to this second subject-matter, then it would have been within the ordinary jurisdiction of the Subordinate Judge's Court at Belgaum, provided the house was within the limits of that jurisdiction. But plainly it was not.

It is, however, contended before us for the respondent that, according to the Court Fees' Act read with the Suits Valuation Act, we have provision made only for two classes of suits, a suit for a bare declaration and a suit for a declaration with a consequential relief. There is, it is urged, no third class of suit provided for, namely, a suit partially for a bare declaration and a suit for a declaration with a consequential relief. Upon this reasoning we are asked to ignore the relief in the plaint for a bare declaration and to look solely to the relief by way of declaration and consequential relief.

S. 17 of the Court Fees' Act is an answer to the argument in question. It provides that "where a suit embraces two or more distinct subjects, the plaint or memorandum of appeal shall be chargeable with the aggregate amount of the fees to which the plaints or memoranda of appeal in suits embracing separately each of such subjects would be liable under this Act."

Here there are two distinct subjects, one the property with the Collector valued at Rs. 60,000 odd; the other the house valued at less than Rs. 5,000. The declaration as to the former can only be of a valuation of more than Rs. 5,000 both for Court fee and jurisdiction. The valuation of both would be the aggregate of the fees to which the plaint would be liable, having regard to these two subjects. Therefore the suit lay within the special jurisdiction of the First Class Subordinate Judge at Belgaum and the appeal could lie only to this Court and not to the District Court.

The decree, therefore, of the District Court must be reversed and the memorandum of appeal to that Court must be returned to the respondent in this appeal for presentation to this Court.

The appellant must have his costs of this appeal and also of the appeal to the District Court.

The first appeal was subsequently heard by the same Bench of Judges, who confirmed the Subordinate Judge's decree.

P. C.

Rachappa Subrao Jadhav Desai v. Shidappa Venkatarao Jadhav Desai.

Defendant thereupon appealed to the Privy Council against (1) the order reversing the District Court's decree (2) the decree affirming the Subordinate Judge.

P. O. Lawrence, K. C., De Gruyther, K. C. and *O'Gorman* for appellant.

E. B. Raikes for respondent.

P. O. Lawrence, K. C., for appellant: The question is whether the suit falls under S. 7 IV (c) of the Court Fees Act, as we contend, or under Article 17 of Schedule II. S. 17 of the Act provides that when a suit embraces two or more distinct subjects, the plaint shall be chargeable with the aggregate of the fees with which plaints in separate suits would be chargeable. The suit here asked for consequential relief, and the plaintiff had to value and did value the declaration. The valuation which he put upon his plaint is final. The Subordinate Judge had no jurisdiction, as his special jurisdiction did not apply: but the District Court has cured that by applying S. 21 of the Code of Civil Procedure. The District Court's decree should stand: that Court's finding of fact in first appeal is final. (Reference was made to the Bombay Civil Courts Act, 1869—Act XIV of 1869. Ss. 5, 8, 21, 22, 22A, 24, 25 and 26 the Suits Valuation Act—Act VII of 1887—preamble and S. 8—the Code of Civil Procedure, 1908 Ss. 15, 16, 21 and O. VII R. 1.)

De Gruyther, K. C.—followed: The preamble to the Suits Valuation Act recites that "it is expedient to prescribe the mode of valuing certain suits for the purpose of determining the jurisdiction of Courts with reference thereto." Under S. 7 of the Court Fees Act the *ad valorem* Court Fee determines jurisdiction. The decision of the Court here that a fixed fee was payable does not give jurisdiction: the Court cannot get jurisdiction by an erroneous decision.

E.B. Raikes for respondent: The Suits Valuation Act, S. 8 applies only where the fee is payable *ad valorem*, not when it is fixed, as here. If section 7 IV (c) of the Court Fees Act applies I am out of Court: but it is does not: the fact that plaintiff may have thought it did is immaterial. The High Court have rightly held that S. 17 applies to the case: the test whether that section applies is whether there are distinct and separate causes of action. *Mul Chad* v. *Shib Charan Lal.* [1], *Chedi Lal* v. *Kirath Chand* [2].

Even if this had been a declaratory suit without any consequential relief at all, the First Subordinate Judge would have had jurisdiction.

It is a common practice in Bombay to value suits for a declaration at Rs. 130 as to this vide *Shrimant Sagajirao* v. *S. Smith.* [3]

1. (1880) I. L. R. 2 All. 676 2. (1880) I. L. R 2 All. 832.
3. (1895) I. L. R. 20 Bom. 736 (738).

P. C.

Raohappa Subrao Jadhav Desai v Shidappa Venkatarao Jadhav Desai.

As to local jurisdiction, the section of the Civil Procedure Code applicable if any, is not S. 21, but S. 18.

P. O. Lawrence replied.—S. 8 of the Suits Valuation Act determines the question of jurisdiction both for original and Appellate Courts. *Gulabsinghji* v. *Lakshmansingji* (1) *Pulla Kannayya Chetti* v. *Rudrabhatta Venkata Narasayya.* 2

The result of plaintiff's valuing his claim at Rs. 130 is to give jurisdiction to one of the lowest Courts. Plaintiff might have valued his claim at over Rs. 5,000 but he has not done so.

Their Lordship's judgment was delivered (December 3, 1918) by

Sir Lawrence Jenkins.

Sir Lawrence Jenkins :—This suit was instituted in the Court of the First Class Subordniate Judge of Belgaum to establish the plaintiff's claim as adopted son to the property of Venkatrao Desai.

The prayers of the plaint are for (1)—

"(1) a declaration that the plaintiff being the lawfully adopted son of the deceased Venkatrao Desai is owner of all his property . . . Rs. 130 ; (2) a permanent injunction may be issued to the defendant prohibiting him from causing obstruction to the immoveable and moveable property that is in the plantiff's possession. Valuation for this purpose is Rs. 5, (3) If it be deemed desirable to grant to the plaintiff any other relief besides this the same may be given."

and so forth. It is alleged in the plaint that the property forming the subject-matter of the suit is worth Rs. 69,000, that it is situate in the Districts of Belgaum and Satara, and that the portion in Belgaum is in the talukas of Athni and Chikodi.

At the date of the suit the only item in the plaintiff's possesion was a house valued at Rs. 250 ; the rest of the property was in the Collector's possession. On the 23rd March, 1910, a decree was passed by the Subordinate Judge in the plaintiff's favour. On the 23rd March, 1910, two appeals were preferred by the defendant from this decree, one to the District Court, the other to the High Court.

That in the District Court was heard first, and it resulted in a reversal of the First Court's decree. From this appellate decree a second appeal to the High Court was preferred by the plaintiff. On the 10th March, 1911, issue of the usual notice was directed and on the same date the defendant withdrew the first appeal that he had previously preferred to the High Court on the 23rd March, 1910.

1. (1893) I. L. R. 18 Bom. 100. 2. (1916) I. L. R. 40 Mad. 1

P. C.

Rachappa Subrao Jadhav Desai v. Shidappa Venkatarao Jadhav Desai.

Sir Lawrence Jenkins.

The plaintiff's appeal from the appellate decree was heard, and on the 26th June, 1912, the decree of the District Court was reversed on the ground that the appeal from the original decree did not lie to that court but the High Court.

Finally, the High Court heard the defendant's appeal to it from the original decree of the Subordinate Judge, and affirmed his decision on the merits.

The defendant applied to the High Court for leave to appeal to His Majesty in Council, but with no success. By an Order in Council, however, dated the 23rd March, 1915 special leave to appeal was granted, and so the present appeal has been preferred.

Looking at the broad results, apart from any technicality, two things are clear in this tangle of litigation. First that the adoption was affirmed as a fact by the Subordinate Judge by whom the case was tried and by the two Judges of the High Court, but was negatived by the District Judge, and, secondly, that in no event had the District Judge any authority to deal with the case as he did. The plaintiff instituted the suit in the First Class Judge's Court, where it could be entertained only in the exercise of the Judge's special original jurisdiction. No objection was taken by the defendant, and the Judge heard and decided the case without any demur, and there can be no doubt that the litigants and the Court intended and understood the disposal of the case to be in the exercise of that jurisdiction. But the District Judge has brushed this aside and foisted on the plaintiff a view of the First Court's jurisdiction that was impossible, and on that footing treated the case as one in which the appeal would lie to his Court. To appreciate the matter now in contest it is necessary to examine certain Acts of the Indian Legislature,

In the mofussil of Bombay there are two classes of Subordinate Judges, designated respectively as those of the First Class and those of the Second Class. Under the Bombay Civil Courts Act, S. 24, the jurisdiction of a Subordinate Judge of the First Class extends to all original suits and proceedings of a civil nature, and that of a Subordinate Judge of the Second Class to all original suits and proceedings of a civil nature wherein the subject-matter does not exceed in amount or value five thousand rupees.

P. C.

Rachappa Subrao Jadhav Desai v. Shidappa Venkatarao Jadhav Desai.

Sir Lawrence Jenkins.

By S. 25 it is provided that a Subordinate Judge of the First Class, in addition to his ordinary jurisdiction, shall exercise a special jurisdiction in respect of such suits and proceedings of a civil nature wherein the subject-matter exceeds five thousand rupees in amount or value as may arise within the local jurisdiction of the Courts in the district presided over by Subordinate Judges of the Second Class.

Under S. 8, with certain exceptions not now material, the District Court is the Court of Appeal from all decrees passed by the Subordinate Courts when an appeal lies, but in all suits decided by a Subordinate Judge of the First Class in the exercise of his ordinary or special original jurisdiction of which the amount or value of the subject-matter exceeds five thousand rupees the appeal from his decision is direct to the High Court.

It is common ground that this suit could not have been heard by the First Class Subordinate Judge in the exercise of his ordinary jurisdiction. This is obvious from the local situation of the property in suit. At the same time it is equally clear that the suit could be heard by him in the exercise of his special original jurisdiction if the amount or value of the subject-matter exceeded five thousand rupees. And this it undoubtedly did; in fact, it exceeded Rs. 60,000, and there is no dispute as to this.

Why, then, is it contended that the suit ought not to have been instituted in the Court of the First Class Subordinate Judge? It is argued that this is the result of provisions contained in the Court Fees Act and the Suits Valuation Act, which, it is said, impose a notional value on the property distinct from its real value, and that this notional value is less than Rs. 5,000.

By S. 6 of the Court Fees Act it is enacted that except as therein mentioned no document of any of the kinds specified as chargeable in the First or Second Schedule to the Act shall be filed, exhibited or recorded in any Court of Justice unless in respect of such document there be paid a fee of an amount not less than indicated by either of the schedules as the proper fee for such document.

Among the documents so specified is a plaint presented to a Civil Court.

P. C.

Rachappa Subrao Jadhav Desai v. Shidappa Venkatarao Jadhav Desai.

Sir Lawrence Jenkins.

S. 7 deals with the computation of fees payable in certain suits, and among them are a suit to obtain a declaratory decree where consequential relief is prayed, and a suit to obtain an injunction. In each case the fee is to be computed according to the amount at which the relief sought is valued in the plaint, and it is provided that in such suits the plaintiff shall state the amount at which he values the relief sought. By Schedule II to the Act a fixed fee of Rs. 10 is prescribed for a plaint in a suit to obtain a declaratory decree where no consequential relief is prayed.

By S. 8 of the Suits Valuation Act it is provided that the value as determinable for the computation of Court fees and the value for the purposes of jurisdiction shall be the same.

The argument is that as the prayer for a declaration is valued at Rs. 130 and that for an injunction at Rs. 5, the value for the purposes of jurisdiction must be taken to be this figure, though the real value exceeds Rs. 60,000.

If this be sound, then the First Class Subordinate Judge had no power to entertain the suit in the exercise of his special original jurisdiction, and, as a consequence, the appeal to the High Court was not competent.

The fee paid by the plaintiff on hisp laint was Rs. 10-6-0 and this cannot be reconciled with the theory that the prayer for a declaration was valued at Rs. 130.

At the same time, there is an evident explanation how this fee was computed, and it is this.

S. 17 of the Court Fees Act provides that where a suit embraces two or more distinct subjects, the plaint shall be chargeable with the aggregate amount of the fees to which the plaints embracing separately each of such subjects would be liable. In accordance with this provision the suit was apparently treated as embracing two subjects, and an aggregate fee of Rs. 10·6, was paid. The injunction which was limited to the house was valued at Rs. 5. The balance of Rs. 10 can only be the fixed fee payable on a plaint in a suit to obtain a declaratory decree where no consequential relief is claimed. And this is what the plaint in effect shows, for it alleges that the "suit is brought for a declaration of title only." This may have been an oversight and an error as to the house, but it was correct as to the rest of

P. C.

Rachappa Subrao Jadhav Desai v. Shidappa Venkatarao Jadhav Desai.

Sir Lawrence Jenkins.

the property. No doubt at the first blush a certain degree of obscurity is occasioned by the allegation that this prayer for a declaration of title *only* is valued at Rs. 130 ; it is contrary to the scheme of the Act that there should be any valuation of such a suit. But all obscurity is dispelled when the explanation of this valuation is realised. It is to be traced to a practice not uncommon in Bombay of valuing a prayer for a declaratory decree at Rs. 130 as being the value on which the fee nearest to Rs. 10 would be leviable.

This practice has no warrant in law, but has been followed from a misconceived notion of what caution requires. But never was caution more misplaced, and their Lordships feel strongly that they ought not to allow the true facts to be distorted out of deference to an erroneous practice. And here it may be noted that the Rs. 130 cannot have been treated as the measure of the fee, for on such a value Rs. 9-12-0 and not Rs. 10 would have been paid.

Then, again, when the plaint is examined, it is at once apparent that as to the whole of the property except the house no consequential relief could have been prayed, and that even as to the house the injunction prayed was demurrable in the sense that no cause of action was disclosed which could have supported this relief.

If regard be had to the real as distinct from the imputed value of the property, the suit was properly instituted in the Court of the First Class Subordinate Judge, and if any part of the fee payable and paid was a fixed fee under Schedule II of the Act, then the notional value of the property or any part of it could not displace its real value for the purposes of jurisdiction.

If as to any other part of the suit a deficient or no fee was paid, the objection would be, not that the suit was outside the Court's jurisdiction, but that the proper fee had not been paid, and that in contravention of S. 6 of the Court Fees Act a document had been filed in Court in respect of which the fee indicated in the schedules had not been paid.

In this case no objection to the Court's jurisdiction was taken in the written statement or the issues, nor was it even suggested in the defendant's memorandum of appeal either to

P. C.

Raohappa Subrao Jadhav Desai v. Shidappa Venkatarao Jadhav Desai.

Sir Lawrence Jenkins.

the District Judge or the High Court that the suit was not properly brought in the Court of the First-Class Subordinate Judge, to be there heard and decided by him in the exercise of his special original jurisdiction.

Had the objection been taken, as it should, if at all, in the First Court, it would have been by no means insuperable. It might have resulted in the rejection of the plaint; but even this extreme measure would not have precluded the plaintiff from presenting in the same Court a fresh plaint, properly framed and valued, in respect of the same cause of action. Probably, however, the objection would have led to the more practical solution of an amendment of the prayer to the plaint by excluding from it the futile and demurrable claim for an injunction. Then the suit would have been in order, and it is because the defendant did not take the objection at the proper stage that he has been able to prolong this litigation, commenced so far back as the 3rd February, 1909, by an appeal to this Board, which, when analysed, rests on no sort of merit, but on the most technical of technicalities.

Their Lordships are of opinion that they would not be justified in assisting an objection of this type; but more than that, they hold that even the technicality on which the defendant relies cannot prevail.

The Court Fees Act was passed not to arm a litigant with a weapon of technicality against his opponent, but to secure revenue for the benefit of the State. This is evident from the character of the Act, and is brought out by S. 12, which makes the decision of the First Court as to value final as between the parties, and enables a Court of appeal to correct any error as to this, only where the First Court decided to the detriment of the revenue.

The defendant in this suit seeks to utilise the provisions of the Act, not to safeguard the interests of the State, but to obstruct the plaintiff; he does not contend that the Court wrongly decided to the detriment of the revenue, but that it dealt with the case without jurisdiction.

In the circumstances this plea, advanced for the first time at the hearing of the appeal in the District Court, is misconceived, and was rightly rejected by the High Court.

P. C.

Rachappa Subrao Jadhav Desai v. Shidappa Venkatarao Jadhav Desai.

Sir Lawrence Jenkins.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed, and the appellant will pay the costs of this appeal.

Solicitors for Appellant :—*T. L. Wilson & Co.*

Solicitor for Respondent :—*E. Dalgado.*

A. P. P.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH.]

PRESENT:—SIR JOHN WALLIS, CHIEF JUSTICE, MR. JUSTICE AYLING AND MR. JUSTICE KUMARASWAMI SASTRI.

Govinda Iyer ... *Petitioner* * (*3rd Respondent*).

v.

Rex ... *Respondent* (*Petitioner*).

F. B.

Govinda Iyer v. Emperor

Criminal Procedure Code, Act V of 1898, Ss. 195 and 476—"Any offence referred to in S. 195," meaning of—Whether those words incorporate the conditions laid down in S. 195 for taking cognisance of the offence by a Court.

The words "any offence referred to in S. 195" in S. 476 of the Criminal Procedure Code refer not merely to the offences specified in S. 195 but also incorporate the conditions laid down in S. 195 for taking cognisance of the offence by a Court.

Petition under S. 115 of Act V of 1908 and under S. 107 of the Government of India Act, praying the High Court to revise the order, dated 12th February 1918, of the Court of the District Munsif of Karur, in Original Petition No. 23 of 1917 (in Originail Suit No. 456 of 1916).

The case came on for hearing before Phillips and Napier, JJ. in the first instance.

Dr. S. Swaminathan for Petitioner.

V. L. Ethiraj for *Public Prosecutor* for Respondent.

The Court made the following

ORDER OF REFERENCE TO A FULL BENCH:—

The prosecution of petitioner for abetment of offences under Ss. 467 and 471 of the Indian Penal Code, has been ordered by the District Munsif of Karur, and objection is now taken that the District Munsif acted without jurisdiction inasmuch as petitioner was not a party to the proceedings in which the forged document was produced, the argument being that the words in S. 476 of the Criminal Procedure Code. "Offence referred to in S. 195" must be restricted to an offence committed in the manner laid down in S. 195. Under S. 195 (1) (c) the offence must have been committed by a 'party'. If therefore the offence has been committed by a person not a party, S. 195 (1) (c) is inapplicable, and it is contended that S. 476 is also inapplicable. This view has been approved *in re Ramalingam*[1] by a bench of this Court following *Abdul Khadar* v. *Meera Saheb*[2], but a different view

* C. R. P. No. 180 of 1918. 26 February 1919.

1. (1916) I. L. R. 40 Mad. 100. 2. (1892) I.L.R. 15 Mad. 224=2 M. L. J. 148.

F. B.
Govinda Iyer v. Emperor.

has been held in the Bombay High Court (*In re Devajivalad Bhavani* [1], and *in re Keshav Narayan* [2]) and in the Calcutta High Court (*Akkil Chandra De* v. *Queen Empress* [3]). This last case was considered in *Jadu Nandan Singh* v. *Emperor* [4], and distinguished on the ground that the former referred to an offence under S. 195 (1) (*c*), and the latter to an offence under clause (*b*) of the same section, but was not dissented from. In this Court there is a *dictum* of Sankaran Nair, J. in *Aiyakannu Pillai* v. *Emperor* [5] that offences in clause (*c*) of S. 195 must be committed by a party, while the scope of S. 476 is not so restricted in which he expressly follows *In re Devjivalad Bhavani* [1], and with this view we respectfully concur, as apparently did the learned Judge who admitted this petition, and consequently we feel constrained to refer the question to a Full Bench.

The fact that some of the decisions quoted relate to S. 478 and not to S. 476 is not of importance, because S. 478 refers to "any such offence," *i.e.*, "any offence referred to in S. 195" as mentioned in the two preceding sections. In both sections therefore the sole question to be determined is the meaning of the words, "offence referred to in S. 195." The word 'offence' is defined in the Code in S. 4, clause (*o*):— "offence means any act or omission made punishable by any law for the time being in force." So there can be no doubt as to the meaning of that. There remain only the words "referred to in S. 195." It is certainly the usual method employed in the drafting of the Code to use the words "made punishable by section * * * (enumerating the sections)", and this form would undoubtedly have been used in S. 476 if it had been the first section in which these offences were grouped together, but it is not, for we have the words in S. 195 itself in clauses (*a*) and (*b*) which run as "any offence punishable under Ss. 172 to 188" and "any offence punishable under Ss. 193, 194, etc." The use of different language in this section seems to be thus sufficiently explained by the fact that S. 476 was referring to S. 195, and it is difficult to see what language would be more appropriate if the legislature did not wish to repeat the long list of sections given in S. 195. Legislation by reference is stated to be due to considerations of brevity, and the same reason will explain the non-recapitulation of this long list of sections. We see no reason why any other explanation is required. To read those words as incorporating the conditions contained in S. 195 for the taking of cognizance is, in our opinion, undoubtedly an extension of the natural meaning of the words "referred to in S. 195". It would be easy to find words appropriate for importing those

1. (1893) I. L. R. 18 Bom 581.
2. (1912) 14 Bom. L. R. 968.
3. (1895) I. L. R. 22 Cal. 1004.
4. (1909) I. L. R. 37 Cal. 250.
5. (1908) I. L. R. 32 Mad 49 at page 57.

F. B.

Govinda Iyer v. Emperor.

conditions if that had been intended; but they are not used. If S. 476 had contained only the sentence, "when any * * * Court is of opinion that there is ground for inquiring into any offence referred to in S. 195, such Court after making, etc.", we should have been of opinion that the words "referred to" were nothing more than a substitute for enumeration. But there is the still further difficulty in the way of the construction put on these words by Abdur Rahim, J. *In re Ramalingam* [1], which is this, that the incorporation of the conditions to be found in S. 195 introduces conditions into S. 476 which partly cover the same ground as the conditions to be found in that section. It cannot be denied that the conditions in S. 195 and those specifically referred to in S. 476 are in *pari materia*. The language in S. 476 is, "and committed before it or brought under its notice in the course of a judicial proceeding." This is analogous to the provision in S. 195 (1) (*b*) where the words are, "when such offence is committed in or in relation to any proceeding in any Court," and the words in clause (*c*), "when such offence has been committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding." It would be strange if the legislature intended to introduce the narrower requirements of clauses (*b*) and (*c*) of S. 195, and yet incorporate into the section the wider language we have in S. 476. Further than that, the suggested construction of the section requires the clause to be read as follows:—"When any Court is of opinion that there is ground for inquiring into any offence punishable under Ss. 193, etc., when such offence is committed in or in relation to any proceeding in any Court and when committed before it or brought under its notice in the course of a judicial proceeding, etc." That is with reference to offences in clause (*b*). With reference to the offences in clause (*c*) the result is still more extraordinary, "It would read * * * into any offence described in S. 463 or punishable under Ss. 471, 475, or 476 of the same Code," when such offence has been committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding, when it is committed before it or brought under its notice in the course of judicial proceeding, etc." It seems to us, with due deference to the view taken *In re Ramalingam*, [1] that to read S. 476 like that is to commit the legislature to inconsistency in some respects and tautology in others. We are therefore thrown back on what we consider to the natural meaning of the words "referred to," and are of opinion that they are only words of description.

We therefore refer for the consideration of the Full Bench the following question :—

1. (1916) I. L. R. 40 Mad. 100.

F. B.
Govinda Iyer v. Emperor.

"Do the words in S. 476 of the Code of Criminal Procedure, "any offence referred to in S. 195," incorporate the conditions laid down in S. 195 for taking cognizance of the offence by a court?"

Dr. S. Swaminathan, counsel for the Petitioner.

The Public Prosecutor on behalf of the Respondent.

The Court expressed the following

Wallis, C. J.

Opinion.—*Chief Justice* :—I am of opinion on the construction of the section that the words "any offence referred to in S. 195" refer to offences within the scope of S. 195, and not to all offences against sections of the Indian Penal Code enumerated in S. 195 whether or not they are within the scope of that section. The preponderance of authority is in favour of this view, beginning with *Abdul Khadar* v. *Meera Sahib* [1]. Parker and Shephard, JJ, gave no reasons for their decision in that case, but they were no doubt familiar with the history of the section, and knew that the words "committed before or brought under its notice in the course of a judicial proceeding" were first introduced into the section in the Code of 1882 as a further limitation on its operation, and that the corresponding sections of the Codes of 1861 and 1872 were clearly limited to cases coming within the operation of the sections corresponding to S. 195 of the present Code. In the Code of 1872, S. 471 (now 476) was immediately preceded by Ss. 467, 468 and 469, which in 1882 were consolidated and transferred as S. 195 to an earlier part of the Code. S. 471 began thus :—"When any Court, Civil or Criminal is of opinion that there is sufficient ground for enquiry into any charge mentioned in Ss. 467 468, and 469, the Court, after making such preliminary enquiry, etc." The marginal note "Procedure in cases mentioned in Ss. 467, 468 and 469", meaning, of course, procedure in cases mentioned in those sections where such proceedings were taken by a Civil or Criminal Court in my opinion correctly represents the effect of the section. There appears to me to be no sufficient reason for holding that S. 471 of the Code of 1872 or the corresponding section of the Code of 1861, intended to give all Courts, Civil or Criminal an unlimited power of originating prosecutions under all the sections of the Indian Penal Code mentioned in the sections

1. (1892) I L R. 15 Mad. 224

F. B.
Govinda Iyer v. Emperor.
Wallis, C. J.

referred to, or that the substitution of the words "any offence referred to in S. 195" for "any charge mentioned in Ss. 467, 468 and 469" had that effect. On the contrary the power conferred on the Court by S. 471 of the Code of 1872, even as restricted with reference to the preceding sections, was apparently considered too wide, and was further limited in 1882 by imposing the restriction that the offence must have been "committed before it or brought under its notice in the course of a judicial proceeding." The attention of the learned Judges who decided *Akhil Chandra De* v. *Queen Empress*, [1] and of the referring Judges in this case was not called to the fact that Ss. 195 and 476 of the present Code were not enacted for the first time in their present form, in which case they might have been expressed differently and other cases, such as the present, included, or to the fact that the awkwardness or tautology to which they refer was the result of introducing a further limitation nito the section by the words added in 1882. In some cases covered by S. 195, the new restriction was no doubt unnecessary as pointed out by the referring Judges, but as a matter of drafting it was the easiest course to make the new restriction in general terms even at some risk of tautology. I may add that, where sections are repealed and re-enacted in slightly different form, there is a presumption against implied as contrasted with express alterations in the scope of the section. I would answer the question in the affirmative.

Ayling, J. :—I agree.

Kumaraswami Sastri, J. :—I agree.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SADASIVA AIYAR AND MR. JUSTICE NAPIER.

Kamhala Narayan ... *Accused* (in S. C. No. 2 of 1919 on the file of the Sessions of the Godavari Division.)*

Kamhala Narayan In re.

Criminal Procedure Code, Ss. 269, cl. (3), 307; 309—Trial for twoc harges, one of which triable by jury and other by Sessions Judge with aid of assessors—Reference under S. 307—Non-compliance with S. 309 in regard to offence triable with assessors—Effect.

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* Reference No. 4 of 1919. 24th February 1919.

1. (1895) I. L. R. 22 Cal, 1004.

Kamhala Narayan *In re.*

In a case in which an accused was tried for two offences, one of which was triable by jury, and the other by the Sessions Judge with the aid of assessors, *held* that the circumstances that the Judge disagreed with the verdict of the jury on the charge triable by jury and desired to make a reference under S. 307, Criminal Procedure Code, did not absolve him from complying with the requirements of S. 309 as regards the offence tried by him with assessors.

Reference under S. 307 of the Code of Criminal Procedure by the Sessions Judge of the Godavari Division at Rajamundry in case No. 2 of the Calendar for 1919.

Accused not represented.

Public Prosecutor on behalf of the Crown.

The Court delivered the following

Judgment :—It does not appear that the Sessions Judge has followed the directions contained in S. 309 of the Criminal Procedure Code which require him to give judgment after recording the opinion of the assessors, to convict if he finds the accused guilty and to pass sentence according to Law.

The circumstances that in this case, the accused is charged in the same trial with another offence triable by Jury (S. 269, cl. 3) of the Code of Criminal Procedure, that the Judge disagrees with the verdict of the Jury on that charge and desires to make a reference under S. 307 of the Criminal Procedure Code, do not, in our opinion, absolve the Sessions Judge from complying with the requirements of S. 309, as regards the offence tried by him with assessors.

The reference is therefore premature and we shall send back the case to the learned Sessions Judge to rectify the irregularity and then act according to law.

A. S. V.

THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR JOHN WALLIS, CHIEF JUSTICE AND MR. JUSTICE AYLING.

T. K. Vasudeva Kamath and others... *Appellants* * (*Plaintiff*).

v.

Nattoji Lakshminarayana Row and others ... *Respondents* (*Defendants*).

Vasudeva Kamath *v.* Lakshminarayana Row.

Provincial Insolvency Act, S. 16—Adjudication—Suit by creditor under S. 53 of the Transfer of Property Act, to set aside transfer made by insolvent—Leave of the Court if essential.

After the order of adjudication is made, it is not open to a creditor of the insolvent to sue under S. 53 of the Transfer of Property Act to set aside a

* A. No. 82 of 1918. 12th February 1919.

Vasudeva Kamath v. Lakshminarayana Row

transfer made by the insolvent, without obtaining the leave of the court as provided by S. 16 (2) (b) of the Provincial Insolvency Act.

Appeal against the decree of the District Court of South Kanara in Original Suit No. 4 of 1917.

K. P. Madhava Row and *K. P. Lakshmana Row* for Appellant.

K. Sundara Row for Respondent.

The Court delivered the following

Judgment :—The question in this appeal is whether, after the making of an order of adjudication under S. 16 of the Provincial Insolvency Act, 1907, a creditor of the insolvent is prevented by the provisions of sub-section (2) (b) of that section from suing under S. 43 of the Transfer of Property Act to set aside a transfer made by the insolvent without first obtaining the leave of the Court. There appears to be a curious absence of authority as to the effect of the corresponding provision in the English Bankruptcy Acts with respect to actions by creditors under the Statute of Elizabeth which corresponds with S. 53 of the Transfer of Property Act. The nature of the suit under the English and Indian Acts has recently been discussed in this Court in *Palaniandi Chetti* v. *Appava Chettiar* [1], *Subramania Ayyar* v. *Muthiah Chettiar* [2] and *Pokker* v. *Kunhama* [3]. It appears that in England, while such a suit should ordinarily be on behalf of all the creditors and the decree should declare the transfer void against all of them, a judgment creditor may sue in respect of his own debt alone and obtain satisfaction for it. The sub-section of this Act provides that " except as provided by the Act no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall during the pending of the insolvency proceedings have any remedy against the person or property of the insolvent in respect of the debt or commence any suit or other legal proceedings except with the leave of the Court and on such terms as the Court may impose." A suit by a judgment-creditor such as I have mentioned without the leave of the Court would, I think, be in contravention of this section, and would enable, the judgment creditor to obtain satisfaction of

1. (1916) 30 M.L.J. 565. 2. (1917) I.L.R. 41 Mad. 612=33 M. L. J. 705.
3. (1918) I L R. 42 M. 143=36 M. L. J. 231=9 L. W. 138.

Vasudeva Kamath v. Lakshminarayana Row.

his decree out of the property declared in the suit to be the property of the insolvent. Even as regards a suit by a creditor who was not a judgment-debtor to declare a transfer void against creditors generally, I think the words of the sub-section "or commence any suit or other legal proceedings" are sufficiently wide to cover a suit to make property available as the property of the judgment-debtor and to forbid the institution of such a suit as this without the leave of the Court. The policy of the law, as disclosed in the section is to place the administration of the estate including the realization of assets under the control of the Court, and it would be opposed to this policy to allow a creditor to proceed with a suit of this kind except with the leave of the Court and on such terms as it might impose. We agree with the Subordinate Judge and dismiss the appeal with costs.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR JOHN WALLIS, CHIEF JUSTICE AND MR. JUSTICE KUMARASWAMI SASTRI.

The Rajah of Pittapuram ... *Appellant** (*8th Claimant*).

v.

The Revenue Divisional Officer, Cocanada, Godavari District. *Respondent* (*Referring Officer*).

The Rajah of Pittapuram v. The Revenue Divisional Officer.

Land Acquisition—Compensation—Valuation Principle—Land acquired subject to occupancy rights of tenants on land—Effect.

The proper mode of valuing, for the purpose of the Land Acquisition Act, land in which tenants have occupancy rights is to ascertain what would be the market value of the land if it were put to the most lucrative use, having regard to its condition, etc., the value of the occupancy rights of the tenants being left to be ascertained afterwards. The difference between the market value and the value of the tenant's interest represents the landlord's interest.

Appeal against the award of the District Court of Godavari at Rajahmundry in O.P. No. 16 of 1916, dated 4th February 1918.

A. Krishnaswami Aiyar for Appellant.

The Government Pleader, (V. Ramesam) for Respondent.

The Court delivered the following

Judgment :—We think the correct rule in cases like this has been laid down by Sir Lawrence Jenkins in *Collector of Belgaum* v. *Bhima Rao* [1], *viz.*, the land to be acquired has to be valued in the first instance including all interests in it, and

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* A.S. No. 171 of 1918. 12th February 1919.

1. (1908) 10 Bom. L. R. 657.

The Rajah of Pittapuram v. The Revenue Divisional Officer.

that the amount so ascertained has then to be apportioned among the parties interested according to their interests. This was followed by Batchelor, J. in *Bombay Improvement Trust* v. *Jalbhoy*[1]. Similarly it was held in Calcutta in *Collector of Dacca* v. *Hari Das Bysak*[2] that the proper way of dealing with lands like this is in the first instance to leave out of consideration the value of the occupancy rights, and to ascertain what would be the market value of the land if it were put to the most lucrative use, having regard to its condition, etc., the value of the occupancy rights of the tenants settled on the land being left to be ascertained afterwards. The fact that neither the landlord nor the tenant can utilize the land for building purposes without the concurrence of the other makes no difference. The difference between the market value and the value of the tenant's interest represent the landlord's interest. These authorities are not referred to in the judgment in Appeal Nos.371 and 372 of 1916, to which the District Judge has referred. We must set aside the award in so far as it relates to the appellant and remand the case for disposal according to law. Costs will abide the result.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE AYLING AND MR. JUSTICE SESHAGIRI AIYAR.

P. S. K. Haji sena Muhamad Abdul Gaffur Rowther and another ... *Appellants* * (*Defendants* 1 *etc.*

v.

Hamida Beevi Ammal and others... *Respondents* (*Plaintiff and Defendants 3 and 4*).

Muhamad Abdul Gaffur Rowther v. Hamida Beevi Ammal.

Interest—Right to, in cases not covered by the Interest Act (*XXXII of* 1839) *—Suit by Mahomedan heir for share of assets—Right to interest.*

The Interest Act is not exhaustive of all claims to interest and it is open to the Courts in India to award interest, in a proper case, independently of the provisions of that Act.

Authorities on the subject reviewed. A Mahomedan minor sued for the recovery of her share of her father's assets from her co-heirs who had utilised the assets to their own advantage. *Held*, that the plaintiff was entitled, in addition to her share to simple interest at the ordinary rate of six per cent. per

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* A. S. No. 390 of 1917. 16th January 1919.

1. (1909) I. L. R. 33 Bom. 483. 2. (1912) 14 I. C. 163.

Muhamad Abdul Gaffur Rowther v. Hamida Beevi Ammal.

annum, on the amount of her share of the assets from the date of her father's death.

Appeal against the preliminary decree of the Court of the Subordinate Judge of Tuticorin in O. S. No. 70 of 1916.

The Hon. Mr. T. Rangachariar and *C. R. Subramania Iyer*, for Appellants.

The Hon. The Advocate General, (*S. Srinivasa Iyengar, K. Rajah Iyer, E. S. Chidambaram Pillai*, and *P. N. Marthandam Pillai*, for Respondents.

The Court delivered the following

Judgment :—This is a suit by a Mahomedan co-sharer for recovery of her share of her father's property from her brothers and sisters. The right of the plaintiff, who was a minor, to sue was denied in the court below but has not been pressed before us. The only two points which Mr. T. Rangachariar argued were : (1) whether the plaintiff is entitled to mesne profits of the immoveable property, and (2) whether she is entitled to interest upon her share of the assets of the partnership carried on by her father. On the first question it was pointed out to us that in the court below there was no allegation that mesne profits were not payable. There is no issue upon the point and there is no discussion in the judgment of the Court below about it. Issue 6 assumes that the plaintiff was entitled to mesne profits, and only raises the question of the deductions claimed by the defendants in their written statement. Under these circumstances we refused to allow the learned vakil to argue that point before us.

The second question has been argued elaborately by Mr. Rangachariar for the appellant and by the learned Advocate-General for the respondent. We have come to the conclusion that the decree of the court below is right though not for the reasons given by it. It is clear from the admissions in the written statement and from the evidence in the case that the share of the plaintiff in the firm's assets was utilised by the 1st and 2nd defendants in the trade carried on by them and that profits were derived from that trade. The amount of profits alone had not been ascertained. The learned vakil for the appellant relied upon *Kamalammal* v. *Perru Meera Levvai Rowther*, [1] *Subramania Aiyar* v. *Subramaniya Aiyar* [2], *Lala Kalyan Das* v. *Sheikh Maqbul Ahmad* [3] and the earlier Madras cases, and contended that as

1. (1897) I. L. R. 20 M. 481=7 M. L. J. 263.
2. (1908) I. L. R. 31 M. 250.
3. (1918) 35 M. L. J. 169 (P. C.)

Muhamad Abdul Gaffur Rowther v. Hamida Beevi Ammal.

no notice of demand was made, no interest was allowable under Act 32 of 1839. All of them were cases under the Act. In the first place it must be pointed out that the Interest Act is not comprehensive of all claims to interest. Without going into details, it may be mentioned that the object of 3 and 4 William IV Chapter 42, S. 28 of which was extended to India by Act 32 of 1839 was to repeal the Usury Laws relating to interest. Prior to the enactment of 3 and 4 William there was a law in the reign of Edward the Confessor which absolutely prohibited courts from awarding interest in suits upon moneys lent. Attempts were made in the reign of Henry VIII, to mitigate the rigour of this prohibition. 3 and 4 William IV Chapter 42 was enacted with a view to meet such a demand. It is clear from the language of the Act that the provisions dealt with only a particular class of cases, and enabled the courts to give interest at the current rate under certain conditions. The framers were anxious that the right to interest, if any, otherwise possessed should not be interfered with by this enactment, and inserted the proviso to the effect that interest shall be payable "in all cases in which it is now payable by law." In India also, ancient texts can be quoted to show that there was a prohibition against the taking of interest on moneys lent. One text of Manu exemplifies the abhorrence felt by the ancient sages on this question. Manu stated: "Neither a brahmin nor a Kshatria, though distressed, must receive interest on loans; but each of them, if he please, may pay a small interest permitted by law, on borrowing for some pious use, *to the sinful man* who demands it." see Colebrooke's Digest, p. 28. It looks as if when 3 and 4 William was extended to India, these provisions contained in the Hindu Law were kept in mind. It is therefore clear that the Interest Act is not exhaustive of the subject.

There is another difficulty in the way of applying the Interest Act to the present case. To attract its provisions the amount in dispute must be a debt or a certain sum payable at a certain time or otherwise. What is claimed now is a sum of money which on taking accounts would be payable to the plaintiff as her share. It was held in *Omrita Nath Mitter* v. *Administrator General of Bengal* [1] that unless the amount is

1. (1897) I. L. R. 25 C 54.

settled the Act is not applicable. In *London Chatham and Dover Railway Co.* v. *South Eastern Railway Co.* [1] a claim to payment under a building contract to be paid monthly on the certificate of the engineer was held not to be a debt or sum certain, if the amount was disputed. See also *Hill* v. *South Staffordshire Railway Co.*[2] In *Ward* v. *Eyre* [3] it was held that a balance of account is not a sum certain within 3 and 4 William Chapter 42. The Calcutta High Court in *Rutnessur Biswas* v. *Hurish Chunder Bose* [4] acted on the same principle. Therefore the Interest Act has no application to the case before us and consequently the decisions relied on by the learned vakil for the appellant have no bearing on the matter we have to decide. On the other hand the cases to which the learned Advocate-General drew our attention establish that the Act was not intended to affect payments of interest or compensation in matters not coming strictly within the letter of the law. In *Miller* v. *Barlow* [5] the Judicial Committee point out that Indian Courts are courts of both of law and of equity and that they can award as damages interest not covered by the Act. In *Hurroprasad Roy* v. *Shamaprasad Roy* [6] a similar principle was enunciated by the Judicial Committee. In *Hamiba Bibi* v. *Lubaida Bibi* [7] which was a case of Dower, the Judicial ...icable

Muhamad Abdul Gaffur Rowther *v.* Hamida Beevi Ammal.

to the case of a Mahomedan lady claiming interest on an unascertained sum of money due to her as her share of the trade. We fail to see any difference in principle between the cases to which we have referred and to the case now before us. The only decision which supports Mr. Rangachariar is *Marian Beevi Ammal* v. *Kadir Meera Sahib Taragan* [1]. In that case there has been no discussion on the question and the reference to the earnings of interest shows that the decision should be confined to the facts of the case. The learned vakil for the appellant relied very strongly upon the observations of the noble and learned Lords in *London Chatham and Dover Railway Co.* v. *South Eastern Railway Co.* [2] for the proposition that in matters outside the Interest Act no interest is payable. The noble Lords who took part in the discussion, especially Lord Herschell, point out that there has been a course of decisions in England which tied the hands of Courts from awarding interest on equitable grounds; and they regretted that they were obliged on the principle of *stare decisis* to decline to re-open the question. There is no such course of decisions in this country. On the other hand, the Privy Council held very early that on principles of equity, justice and good conscience which are specially referr[illegible]

no bearing on the present question and we are not prepared to allow compound interest at 6 per cent. The interest allowed will be reduced to 6 per cent throughout. Subject to this modification we dismiss the appeal with costs.

Mahomed Abdul Gaffur Rowther v. Hamida Beevi Ammal.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR JOHN WALLIS, CHIEF JUSTICE AND MR. JUSTICE NAPIER.

Origanti Venkatarathnam ... *Appellant** (*3rd Deft.*)

v.

K. Desikachari and another ... *Respondents.* (*Plff. and 1st Deft.*)

Origanti Venkatarathnam v. Desikachari.

Original Side Rules—Rule 119—Contempt—Committal for—Jurisdiction of court—Order disobeyed passed by Official Referee—Effect—Form of order.

Where in a case referred to the Official Referee he made an order directing a party to produce before him certain documents alleged to be in his possession and on his failure to do so, the court committed the party to contempt under Rule 119 of the Original Side Rules for wilful disobedience of the order, *held* that the order of commitment was perfectly within the jurisdiction of the court. 11 B. H. C. R. 4 followed.

In view of the circumstance that it was not clear whether, at the date of the application for committal, the books ordered to be produced were in the possession of the party committed, their lordships modified the order appealed against which committed the party "until such time as he shall comply in all respects with the said orders of the Official Referee and purge himself of the said contempt by substituting for the words "until such time as he shall" the words "for a term of three months from the date of his arrest unless he shall at any time before the expiration of the said term."

10 C. B. (N. S.) 39 ; 21. Q B. D. 236 referred to.

On appeal from the judgment of the Hon. Mr. Justice Coutts Trotter, dated the 21st day of December 1917, passed in the exercise of the Ordinary Original Civil Jurisdiction of this Court in Civil Suit No. 306 of 1916.

T. Narasimha Aiyangar, A. Krishnaswami Iyer and *K. G. Babu Rao* for Appellant.

V. V. Srinivasa Aiyangar and *Venkatasubba Rao* and *Radhakrishnayya* for Respondents.

The Court delivered the followig

Judgment :—This is an appeal from an order of Coutts Trotter, J., directing the third defendant to be committed for contempt for disobeying four orders of the Official Referee to produce certain documents alleged to be in his possession. The account books in question were admitted by the 3rd defendant in his affidavit of documents to be then in his possession. He was in charge of the Bezwada branch of the suit business, and

* O. S. A. No. 1 of 1918. 21st November, 1918.

Origanti Venkatarthnam v. Desikachari.

the accounts which were the accounts of the branch were kept there. They had been sent to Madras for the purpose of an arbitration in the present suit and then taken back to Bezwada, and the correspondence shows that they were again sent to Madras in connection with the arbitration in February 1913. The arbitration fell through, as appears from a summons taken out on 3rd March, 1917 relating to the further prosecution of the suit. There is evidence that the books in question were sent back to Bezwada on the 6th of March, where it appears they were wanted for the purpose of making up accounts with the Bombay branch of the business. Read with this evidence Ex. XXXV dated 20-5-17 clearly establishes in our opinion that the missing books were then at Bezwada, as it would have been impossible to make up the accounts for the successive years 1911, 1912, 1913 and 1914 without them, and we cannot accept the 3rd defendant's story that these accounts were written up in Bezwada from materials obtained from the books in Madras. The 3rd defendant was in possession of the books in May and should have produced them with the rest of the books produced by him at the beginning of August. He has neither produced them nor given any satisfactory account of what has become of them, and we are unable to interfere with the finding of Coutts Trotter, J., that he has been guilty of wilful disobedience to the order of the Official Referee, and has rendered himself liable to commitment for contempt under Rule 119 of the Original Side Rules. The fact that the order for production was made by the Official Referee to whom the case had been referred makes no difference. *Dhurandhar Das Sakha Ram* v. *Bhan Govind* [1]. The order, as drawn up, contains this "until such time as he shall comply in all respects with the said orders of the Official Referee and purge himself of the said contempt." It is not clear whether at the date of the application for committal the missing books were in his possession or that of the 1st defendant who has now fallen out with him, and in these circumstances we modify the order by substituting for the words " until such time as he shall " the words "for a term of three months from the date of his arrest unless he shall at any time before the expiration of the said term," a form of order

1. (1873) 10 Bom H. C. R, 4

approved in *Exparte. Fernandez* [1], and by Matthew, J., in *In re Maria Annie Davies* [2]. Otherwise the appeal is dismissed with costs of plaintiff.

Origanti Venkata rathnam v. Desikachari.

Memo of objections dismissed with costs payable by plaintiff.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR JOHN WALLIS, CHIEF JUSTICE AND MR. JUSTICE SESHAGIRI AIYAR.

V. Ponniah Nadan and others. ... *Appellants.**

v.

T. N. Deivanai Ammal and others. ... *Respondents in all (Claimants 1 and 1 (a)).*

Ryotwari land—Ownership of the soil—Right of pattadar—Claim of occupancy right by cultivating tenant—Burden of proof—Inference of occupancy right from circumstances—Length of enjoyment—Low and unvarying rent—Transfer of holdings by tenant—Effect of.

Ponniah Nadan v. Deivanai Ammal.

In the case of lands held under ryotwari settlements, the presumption is that the ryotwari pattadar is the owner of the land and the burden is on his tenants claiming a permanent right of occupancy to prove it. Mere length of enjoyment in the capacity of tenants or purakudies irrespective of other circumstances does not raise a presumption of occupancy right. The inference as to occupancy right depends on a consideration of the whole circumstances of the case and among those circumstances are the continuance of the lands in the same hands at low and unvarying rents and the recognition by the landlord of the tenant's right to transfer the holding.

Authorities on the subject reviewed.

Held, on the evidence in the case, that the tenants had not made out their claim to occupancy rights in the suit lands Situated in the Tinnevelly District.

The history of the ryotwari settlement in the Madras Presidency and in the Tinnevelly District, discussed by *Seshagiri Iyer, J.*

Appeals against the decrees of the District Court of Tinnevelly in compensation References Nos. 42, 27, 28, 32, 33, 34, 39, 56, 57, 58 and 59 of 1916.

T. Narasimha Aiyangar and *K. V. Sesha Aiyangar*, for Appellant.

T. R. Venkatarama Sastri and *T. M. Ramaswami Aiyar*, for Respondents.

The Court delivered the following

Judgments:—*The Chief Justice.*—The question is whether the compensation awarded under the Land Acquisition Act for

Wallis, C. J.

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* A. S. No. 241 to 251 of 1917. 15th August 1918.

1. (1861) 10 C. B. (N. S.) 3; 39.
2. (1888) 21 Q. B. D 236.

Ponniah Nadan v. Deivanai Ammal.

Wallis, C. J.

certain lands in a village in Tinnevelly should be apportioned between the pattadar a registered holder, which in this case is a temple, and the ryots under it on the basis that the ryots have occupancy rights in the lands, a claim which the District Judge has rejected. The Fifth Report speaks of a practice in Tinnevelly under which land, which had been under cultivation by the mirasidars or hereditary owners and had afterwards been left uncultivated by them, was cultivated by others who paid them 13 p. c. of the produce as Swami Bogam and divided the rest between the Government and themselves. There was a somewhat similar usage in Chinglepet. Mr. Venkatrama Sastriar for the respondent in this case, says that it has not been proved that these lands were cultivated by the tenants in this way.

All that we know is that in 1817 a pious founder acquired at a revenue sale a five-sixths' interest in the lands in this village, and that he acquired the remaining one-sixth under Exhibit JJ. Exhibit JJ is a sale of the one-sixth share of the land, and does not refer to the existence of any persons on the land in the enjoyment of occupancy right. As regards the remaining 5/5th also, the presumption would appear to be that at the revenue sale what was purchased was the land. It may be that some, at any rate, of the predecessors of those tenants were on the land at that date but of that there is no evidenee. Exhibit CC-183 is an order of the Board of Revenue to the Collector to resume the villages owing to diversion of the revenues to private purposes. It probably meant that the Collector was to manage under Regulation VII of 1817. Exhibit DD of 1842 orders the villages to be handed over to the founder's son who is to make arrangements to "manage the cultivation" and other business. Mr. Venkatrama Sastri relies strongly on this expression as negativing the existence of hereditary cultivators and showing that the trustee on behalf of the temple had the right to cultivate the land himself. If so, this would be against the claim to occupancy right. Exhibit FF is a cadjan muchilika executed by the tenants in 1856 in which they acknowledge they have received an Adaolai or lease from the temple. If they do not observe its terms they are to be liable to eviction. They are to wait on the trustee every three years and to receive an adaolai

like the one that had been granted to them, and in default were to abide his pleasure. This document does not seem to be conclusive either way, and was found not to have been proved by Mr Goldie, the District Judge in the appeal referred to below. Exhibt GG of October 1857 and the following documents show that there was a dispute as to the proper entries to be made in the village accounts. Till 1856, the patta had been in the name of the temple and the names of the cultivators had been shown as in actual enjoyment but apparently without reference to separate plots. As he considered the cultivators had only the right of cultivation, the Kurnam in the new accounts had not entered their names. The trustee was anxious that his name should be entered, but the Collector's assistant thought it better that he should be shown as being in enjoyment as Hukdar. Exhibit GG1, the register of personal complaints of 17-1-1859, shows that in that year the cultivators complained that, "though the village had all along belonged only to the ryots" it had been registered in the name of the trustee. The order refused to cancel the right of the Hukdar in the patta or to register them as in enjoyment and referred them to a civil suit. Exhibit HH is a razinamah setting forth a complaint made by the Hukdar's lessee against the ryots which was settled in the lessee's favour.

Exhibit 2 dated 12—10—1859 shows that the Hukdar filed a revenue suit against the tenants to enforce the acceptance of adaolais which was dismissed by the acting Collector for default. At the same time he passed an order with reference to the ryot's claim to be entered as in enjoyment. They had admitted that the lands were the property of the pagoda, but objected to the entry of the Hukdar as in enjoyment. The Collector observed that the entry of his name in the column of remarks tended to create disputes and mislead the authorities to the possible prejudice of the ryots' rights in the soil. He accordingly directed the trustees' name to be struck out and the names of the ryots entered. For arrears of revenue the ryots' crops were not to be liable but the land. This order was apparently confirmed by the Collector, and thereupon the Hukdar filed O. S. 28 of 1859 in the Tinnevelly Munsiff's Court. The plaint Exhibit A. alleges in paragraph 4 that prior to 1856 the Hukdar had been in the habit of leasing the village to defendants

Ponniah Nadan v. Deivanai Ammal.

Wallis, C. J.

2,5, 18,43 and 46 who were cultivators in the village,and that these lessees let out the land to the other defendants for cultivation and cultivated it. It was very common for the landlord to arrange with a few leading villagers for the cultivation of the village and leave them to make their own arrangements with the other villagers and as pointed out in *Chidambaram Pillai* v. *Thiruvengadathiengar* [1] this if established, would negative the existance of occupancy right. The plaint also relied on Exhibit FF in the present suit, the muchilika executed on 25-11-1856 by 33 defendants said to be the leading villagers, and alleged that, the 7th defendant had refused to execute the muchilika and induced the other tenants not to pay their rents. Several of the defendants asserted that the lands had been re-claimed by them, and alleged that the temple was only entitled to the swamibhogam. 71 defendants admittedt he plaintiff's claim. The Principal Munsiff gave judgment for the plaintiff. The District Judge confirmed the decree as regards the 71 who had admitted the plaintiff's claim but reversed it for misjoinder as regards the other defendants. Exhibit A 4 of 12-6-1861. 88 of the other defendants then compromised the case in the District Court, Exhibit B to B 4 series, to avoid the expense of suits on the terms of accepting thedecree of the Munsiff's Court directing them to surrender possession. 28 defendants held out and after decrees had been passed against them by the Munsiff succeeded in getting those decrees reversed by the District Court in A. S. No. 110 of 1864. Exhibit V dated 2-2-1865, and the connected suits which were confirmed on Second Appeal by the High Court. The District Judge in Exhibit V gave reasons for not accepting the genuineness of Exhibit FF already referred to, and stated that the plaintiff's own witnesses admitted that the defendant had been in possession of the lands in suit for neraly 20 years and of the house for over 30 years, and considering the defendants had proved that the disputed lands had been in his and his family's undisturbed possession for a very long period and that his tenancy was a permanent tenancy dismissed the plaintiff's suit in ejectment. It had been previously ruled by Scotland and Holloway, JJ., in *Alagaiya Tiruchithambala* v. *Saminatha Pillai* [2] that the question whether ryots under the mirasidar have a title to the permanent occupancy of lands subject to the payment of the mirasidar's share for the most part

1. (1896) 7 M. L. J. 1.

2. (1868) 1 M. H. C. R. 264.

depended on established usage and custom which had to be proved. The High Court in the Second Appeals apparently accepted the findings of the District Judge that it had been proved in this case. We next come to O. S. No. 31 of 1884 on the file of the Subordinate Court of Tinnevelly, another suit for ejectment and other similar suits. In his judgment H 2 dated 17-12-1885 the Subordinate Judge gave judgment for the plaintiff on the ground that the defendant's father had admitted the plaintiff's right in the suit of 1859.

Exhibit T dated 21-7-1886 is judgment in O. S. 42 of 1884, a suit to fix the rent payable by plaintiff to defendant on account of defendant's refusal to receive rent at rate alleged to have been fixed by his father in 1867 in one of the areas in which permanent *tenure* had been established in the litigation already mentioned. Exhibit V (c). In O. S. 9 of 1901 in the District Munsiff's Court of Srivaikuntam, a suit by the Hukdar for ejectment, it was found by the District Munsiff that the tenants were not entitled to occupancy rights by virtue of the decisions in the previous suit, but that their right of occupancy was established independently. In Exhibit VII (c) O. S. 23 of 1905 in the District Munsiff's Court a suit for ejectment was allowed to be withdrawn with liberty to bring a fresh suit.

In O. S. 637 of 1906 in the District Munsiff's Court another suit for ejectment, it was held to be *res judicata* as regards the particular land that there was no occupancy right.

The trustee also relies on N N series which he took in 1884.

The appellants rely on numerous transfers since 1884, sales both private and in execution and mortgages of their interest by tenants. The District Judge has held that these were not brought to the knowledge of the plaintiff. If the transfers were genuine, the plaintiff must have received the rents from the transferees and I think the appellants are entitled to contend that his failure to produce his accounts raises an inference against him in this respect.

Now as to the presumption to be applied to the case, the reason that the Courts, even before the passing of the Madras Estates Land Act of 1908, raised a presumption of occupancy right in favour of ryots holding under a permanently settled

Ponniah Nadan v. Daivanai Ammal.

Wallis, C. J.

zemindar, and not in favour of ryots holding under a ryotwari pattadar, was, that there was no presumption in the case of the permanently settled zemindar that he was the owner of the land except as assignee of the Government interest therein, whereas the scheme of the temporary ryotwari settlements was to settle the revenue with the owner of the land himself. In neither case, it is well established, was there any intention to interfere with the legal relationship that might exist between the person with whom the revenue settlement was made and those holding under him. The presumption being that the ryotwari pattadar was the owner of the land, the Courts have proceeded on the view that the burden is on his tenants claiming a permanent right of occupancy to prove it.

I have recently dealt in *Meera Muhammad Rowther v. Muthu Alagappa Chettiar* [1] with the Tanjore temple cases in which this was laid down and followed the ruling in *Chidambram Pillai v. Thiruvengadathiengar* [2] which has been approved in subsequent cases. Those Tanjore cases had a special history and facts in common which differentiate them from cases such as the present, and led, except in one case to the rejection of the claim to occupancy right. All that was laid down generally in *Chidambaram Pillai v. Thiruvengadathiengar* [2] and the cases which followed it was that the onus was on the tenant and that mere length of enjoyment in the capacity of tenants or purakudies irrespective of other circumstances did not raise a presumption of occupancy right. The qualification is important because it shows that the inference as to occupancy right is to depend on a consideration of the whole circumstances of the case and among those circumstances are the continuance of the lands in the same hands at unenhanced rents, especially if they are low, the recognition of the tenants right to transfer his holding etc., as pointed out by the Privy Council in *Ramchunder Dutt v. Joghes Chunder Dutt* [3] *Nabakumari Debi v. Beharilal Sen* [4], *Upendra Krishna Mandal v. Ismail Khan Mahamad* [5], *Nilratan Manlal v. Ismail Khan Mahamad* [6]. The same thing was laid down in *Viranan Ambalam*

1. (1917) 34 M. L. J. 234
2. (1896) 7 M. L. J. 1
3. (1873) 12 Beng. L. R. 229.
4. (1907) I. L. R. 34 Cal. 902. (P. C.)
5. (1904) I. L. R. 32 Cal. 41. (P. C.)
6. (1904) I. L. R. 32 Cal 51. (P. C.)

Ponniah Nadan v. Deivanai Ammal.

Wallis, C J.

Peria Karuppan Ambalam v. *Annaswami Aiyar* [1] and *Venkatachella Goundan* v. *Rangaratnam Aiyar* [2]. These are facts which it is for the tenant to establish.

The task of drawing the right inference in the present case is one of some difficulty, which is increased by the fact that the claim is in respect of compensation awarded for land taken from different holdings, as to which owing to the facts set out above the rights of the tenants may be different, and because the evidence does not enable us to trace the history of respective holdings from which the acquisition was made in the dispute about the existence of occupancy right which has been going on with varying fortunes in the village for the last sixty years. The fifth Report shows that in Tinnevelly before the settlement of the Revenue at the beginning of last century there were ryots holding with rights of occupancy under the mirasidars. If that was the case in the suit village I do not think that it matters that a five-sixth share in the village was purchased for the temple at a revenue sale, because, even if the land was sold free of encumbrances, the presumption in the circumstances would be that the temple continued the tenancies on the old footing. There is, however, no evidence that this was the state of things in the suit village, and the order of 1843 Exhibit DD as to the temple arranging for the cultivation points the other way. The fact that 28 ryots established their occupancy rights in the litigation which began in 1859, though it does not make the issue *res judicata* as regards the lands now in suit, is entitled to considerable weight, but the reversing judgment of the District Judge which was confirmed by the High Court without comment on second appeal apparently as a finding of fact, does not appear to me to give reasons which would now be regarded as sufficient to establish the claim to occupancy right. On the other hand we have the fact that the great majority of the tenants had given up their claim to occupancy rights at an earlier stage of the litigation.

As regards the rates of rent sharing or waram system seems to have prevailed until 1867 as regards nunja or wet land, and to have been commuted at that time. It is not shown that the temple's share was less than that of ordinary owners, or that

1. (1911) 21 M. L. J 845. 2. (1913) 24 M. L. J. 571.

Ponniah Nadan v. Deivanai Ammal.

Wallis, C. J.

the punja money rates were unduly low. As regards the evidence that the rents have not been raised since, and the evidence, which is all of it fairly recent, that the tenants have been freely allowed by the temple to transfer their holdings, I do not think that in the present case it can be treated as a recognition by the temple of the existence of occupancy rights, because it is clear that for the last 60 years the temple has been openly and notoriously contesting the existence of occupancy right in the village in the numerous proceedings which I have mentioned above. In these circumstances I have come to the conclusion that there are not sufficient reasons for differing on the main question from the conclusion on the evidence at which the learned District Judge has arrived and which has also been arrived at by my learned brother. In this and other respects I agree in the order proposed by him.

Seshagiri Aiyar, J.

Seshagiri Aiyar, J.—These eleven appeals have been preferred against the judgments of the District Judge of Tinnevelly refusing compensation under the Land Acquisition Act to the appellants, and awarding it entirely to the respondents. The lands are situated in a village called Kachanavilai. It is common ground that about the year 1817, five-sixths of the village was purchased at a revenue sale by one Vengu Mudaliar; and the other sixth at a private sale. The lands were dedicated as an endowment for the performance of a *Kattalai* in a temple. The respondents represent the founder of the *Kattalai*, and claiming to be the sole trustees contended that the proprietory right in the lands belongs exclusively to the *Kattalai*.

The defendants, on the other hand, alleged that they and their ancestors have been in uninterrupted enjoyment of the lands paying the Circar kist either direct or through the Hukdar, and paying the Hukdar a low and uniform rate of rent. They therefore, claimed to have occupancy right in the lands. The District Judge held that the occupancy right was not established. Hence these appeals.

A brief narration of the previous litigation in connection with this village must be given in order to appreciate properly the arguments addressed to us on the present occasion. The ryotwari patta for the village stands in the name of the temple (Vide M M series). As to when the first patta was granted there

Ponniah Nadan v. Deivanai Ammal.

Seshagiri Aiyar, J

is no reliable evidence. But we knew from Exhibit DD dated the 7th of September 1842 that the Collector ordered the Tahsildar to issue patta to the temple. MM (1858-1859) is the earliest patta that has been produced. A few years before MM, the cultivators of the village executed a joint muchilika in which they stipulated that they shall receive an *adayolai* every three years in respect of the properties under their cultivation. There is a condition in it that if the cultivators fail to act properly, the Hukdar was entitled to resume the lands. This was on the 25th of November 1856. Then some correspondence passed as to whether the Hukdar's name should be entered in the patta. The tenants apparently claimed even at this date that their name should be inserted as persons in occupation (Vide GG series). In consequence of these disputes the Collector ordered that the name of Vengu Mudaliar should be struck out and that the cultivators' names should be entered instead (Exhibit II). This was on the 12th of October 1859. Thereupon Vengu Mudaliar brought a suit in the Court of the Sadar Amin, Tinnevelly, to eject the cultivators and recover arrears of rent from them (Vide Exhibit A dated the 17th of December 1859). The principal Sadar Amin gave a decree as prayed for (Exhibit A4). It may be mentioned here that there was but one suit against all the cultivators who numbered nearly 270. 71 of them admitted the right of the plaintiff. A number of other defendants did not file any written statement. 65 defendants alone contested the plaintiff's claim. An appeal was preferred against the judgment of the Sadar Amin. Mr. Goldie, the then District Judge, without expressing any opinion on the merits held that the suit was bad for misjoinder of parties and causes of action and reversed the Sadar Amin's decision (Exhibit V). Even after this reversal a large number of the defendants entered into a Razinamah with Vengu Mudaliar by which they acknowledged the title of the Hukdar to eject them and agreed that if they failed to obey the conditions of the Razinamah they shall be bound by the decree passed by the Sadar Amin on the merits. The one suit was split up into a number of suits and the Sadar Amin once again went into the merits of the case and came to the same conclusion as before. Against his decree 28 cultivators preferred appeals to Mr. Goldie. He held that as the cultivators had been in possession for 20 or 30 years they were entitled to occupancy rights.

Ponniah Nadan v. Deivanai Ammal.

Seshagiri Aiyar, J.

The special appeals preferred to the High Court were summarily dismissed. It is apparent from what I have stated that 28 of the defendants who were originally impleaded in the suit established their rights in the High Court. Exhibits D,E,F,G, to S show that proceedings in ejectment were taken against some of the other cultivators.

The next litigation was in the year 1884 (vide Exhibit T) in which the question regarding the proprietary right in the soil was not considered. The question was about the rate of rent that should be paid to the Hukdar. Then comes Exhibit V (c) which was a suit instituted in the year 1901 in the District Munsif's Court, Srivaikuntam. About 11 cultivators contested the right of the Hukdar to eject them. The Munsif came to the conclusion that they had acquired occupancy right. It is not clear whether there was any appeal in these cases. Matters seemed to have gone on smoothly until the Government proclaimed in 1915 that they intended to acquire the lands in dispute for the Trichandur Railway. As a consequence of this notification, the cultivators have preferred claims to a share in the compensation on the ground that they have occupancy rights in the land.

Four of these appeals may be disposed of at once. They are appeals No. 241, 245, 248 and 249. The District Judge in the last paragraph of his judgment says that the lands in respect of which compensation was claimed in these four appeals were delivered over to the respondents' predecessor in-title by virtue of proceedings in execution taken by him. Exhibit C shows that a large number of the cultivators were evicted from their holdings for failure to comply with the conditions of the Razinamah embodied in Exhibit B. The District Judge has stated that the appellants in those four appeals were among these against whom proceedings were thus taken. There was no ground of appeal disputing the correctness of the statement made by the District Judge. We are not prepared to allow that question now to be re-opened. We must therefore hold that the proceedings taken under Exhibit C are binding upon the appellants, and that they are estopped from claiming occupancy right.

Now we have to deal with the seven appeals on the merits. Mr. Narasimha Aiyangar for the appellants contended that the facts established in evidence are sufficient to warrant the conclusion that his clients have occupancy right in the lands. The

first circumstance relied on for this purpose is the payment of a uniform rate of rent. It is clear from a reference to Exhibit T (1) that the present rate was fixed in 1856. We may therefore take it that for 47 years the same rate was continuously paid to the Hukdar. I do not accept the learned Vakil's contention that it was only a nominal rent that was paid. It was in the year 1868 that commutation from waram was made regarding the rate of rent. The sum of Rs. 2-7-0 per acre of *nanja* paid to the landlord after deducting the circar kist cannot be regarded as a low rate. The next circumstance relied on was continuity of possession. There is evidence on the side of the Hukdar, which is to some extent specific, showing that the cultivators were changed from time to time. The District Judge has expressed no opinion upon this evidence, and I do not desire to base my judgment upon that deposition. But having regard to the usual *mamool* in this country of not changing a cultivator unless it be under very exceptional circumstances, I am not prepared to attach much weight to this contention. In the southern parts of this Presidency instances can be cited of persons cultivating the same land for generations. This is largely due to the feeling on the part of the proprietor that it is a sin to turn a cultivator out of the field which he has ploughed and enriched, and to the feeling and the veneration which the latter entertains to his master. I am averse to basing any conclusion regarding rights in the soil upon continuous possession even granting that the contention of the appellant is well founded. I must also point out that no attempt has been made in the Court below by the cultivators to prove that they, their fathers, and their grand-fathers have been continuously in occupation of the same land for any length of time. The next circumstance relied on was that the cultivators have been alienating the lands as if they were the owners thereof. The District Judge points out that it has not been shown that any of those alienations were made to the knowledge of the Hukdar. Mr. Narasimha Aiyangar has drawn out attention to one single instance in which the Hukdar's *Kariasthan* is said to have written the deed of mortgage. This is not enough to bring home to the Hukdar the fact that the cultivators were dealing with the property as if they were the proprietors. Moreover most of these transactions are of very recent date, and I do not think they are of any

Ponniah Nadan v. Deivanai Ammal.

Seshagiri Aiyar, J.

consequence in determining the rights of the parties. There is no doubt the fact that some of the tenants did succeed in obtaining a decision in their favour establishing their occupancy right. In the present case no attempt has been made to show that any of the appellants derived title under those cultivators. Therefore the plea of *res judicata* is not available to them. None the less those judgments are evidence of the right now put forward. But their probative value is not much as the judgment of Mr. Goldie solely proceeded upon possession for 20 or 30 years, a fact which the Judicial Committee in *Mayandi Chettiyar* v. *Chokkalingam Pillai* [1] and the High Court in recent cases have held to be insufficient to prove occupancy right. On the other side Mr. Venkatrama Sastriar referred us to the fact that a majority of the cultivators accepted the position of tenants at will by executing muchilikas. He also referred us to certain compensation proceedings of 1858 in which the right of the Hukdar was accepted by the Government to the total exclusion of the cultivators. (See the evidence of P. W. 8.)

Both the learned vakils relied upon the use of the word 'Swamy Bogam' in support of their contentions. It is true that the expression denotes that the person receiving it is the owner and proprietor of the land. Wilson in his glossary gives this as the correct rendering of the expression. On the other hand Mr. Hodgson seemed inclined to the view that the expression connoted that the cultivators had an interest in the land. (See Fifth Report, Volume III, page 346.)

To sum up, the facts in favour of the appellants are :—(*a*) Payment of a uniform rate of rent for nearly 50 years ; (*b*) an alleged continuous occupation from father to son for the same period; (*c*) alienation of the property in their possession without the knowledge or consent of the Hukdar during recent years; (*d*) two judgments on two different occasions in their favour establishing occupancy right after contest. The circumstances against their contentions are : —(1) the majority of cultivators in the village have agreed to hold their lands as tenants at will ; (2) in a previous Land Acquisition proceeding some of the tenants did not set up a right of occupancy ; and (3) they are cultivators under ryotwari patta holders.

1. (1904) I. L. R. 27 Mad. 291.

Ponniah Nadan v. Deivanai Ammal.

Seshagiri Aiyar, J.

I have held as regards (*a*) that the rent paid is not insignificant; as regards (*b*) I am not satisfied that there had been continuous occupation from father to son; as regards (*c*) no weight can be attached to it as the transactions were behind the back of the Hukdar; and as regards (*d*) it cannot be disputed that the judgment of Mr. Goldie, if it comes up for consideration before the High Court to-day, will not be upheld on the grounds mentioned by him. As regards the judgment of the District Munsif, he was largely influenced by the judgment of Mr. Goldie and had referred to a few other circumstances which do not advance the case of the tenants any further. The circumstances referred to as being against them detract very much from the value to be attached to the points established in their favour.

My decision would therefore largely depend upon the view I take as to onus of proof in this case. If I come to the conclusion that the burden is upon the cultivators to establish their right of occupancy, I shall have no hesitation to decide that they have failed to discharge it. If, on the other hand, I hold that it is for the Hukdar to show that he has the sole proprietary right, I would hesitate before holding that they have proved their case. Therefore it becomes necessary to consider the question of the burden of proof.

In order to come to a proper conclusion on this point it is necessary to consider the nature of the right which a ryotwari pattadar has in the soil. Contemporaneous with the permanent settlement under Regulation XXV of 1802, the question was considered on what basis the remaining lands should be settled. There were a number of conflicting views. Some Revenue Officials recommended the *Mutta* system, that is, a system by which a number of villages were intended to be granted to a single owner making him responsible for the Government assessment. Others were in favour of the *village* system by which it was expected that each village would be handed over to the headman or some respectable person in the village who would parcel out the lands to the cultivators and would also be responsible to the Government for kist. And lastly there were others who advocated the ryotwari system by which it was intended that small holdings should be allotted to a large number of persons. Sir Thomas Munro was a strong Advocate

Ponniah Nadan v. Deivanai Ammal.

Seshagiri Aiyar, J.

of the Ryotwari Settlement In the Ceded Districts to which he was appointed Principal Collector after the war with Tippu, he tried the experiment and succeeded beyond expectation in showing that both the ryots and the Government were benefitted by the Ryotwari system. Although the Government of the day recognised the success of the experiment in these districts, they were not prepared to give effect to it in the other districts. In a letter addressed to Sir George Barlow, the then Governor of Madras, by the Board of Revenue, the Board while remarking that "under the ryotwari settlement the Officers of Government were supposed to settle and collect the rent from each farmer", pointed out that what was achieved by Colonel Munro in the Ceded Districts could not be expected of other Officers in the other districts, and that the system was fraught with danger to Government revenue. This letter was signed by Mr. Hodgson as a Member of the Board of Revenue. Thereupon the Governor-in-Council accepted the recommendation of the Board, and ruled that the ryotwari system should not be introduced in the other districts. Meanwhile Sir Thomas Munro went to England, and was invited to give evidence before a Select Committee of the House of Commons on the 15th of April 1812. He strongly advocated the ryotwari settlement. This is what he said in his evidence :—"Every ryot, who is likewise a cultivating proprietor of the land which he holds, is permitted to hold that land, at a fixed assessment as long as he pleases; he holds it for ever without any additional assessment. If he occupies any waste or additional land, he pays the assessment that is fixed upon that land, and no more; his rent undergoes no alteration." Apparently his view prevailed, as we find that the Court of Directors agreed to introduce the ryotwari settlement in Madras. On the 16th of December 1812, the Court wrote :—"It remains for us to signify our directions that in all the provinces that may be unsettled when this despatch shall reach you, the principle of the ryotwari system, as it is termed, shall be acted upon, and that where village rents upon any other principle shall have been established, the leases shall be declared to be terminable at the expiration of the period for which they may have been granted."

The next question that I propose to consider is, what was the nature of the right that was secured by the Ryotwari system.

I have already referred to the evidence of Sir Thomas Munro before the Select Committee. In one of his Minutes dated the 15th of August 1807 this is what he says about the Ryotwari system :—" That it is better adapted to preserve simplicity of manner and good order, because every ryot will, on his own estate, be at once proprietor, farmer, and labourer ; because the division of property by engaging men in labour for their maintenance, is favourable to quiet." Baden-Powell in his Land Systems of British India gives this definition of the ryotwari system :—" A system of Land Revenue Administration in which there is no middleman or landlord over the individual ryots, who are severally liable for the Land Revenue Assessment on the holding." Again, quoting from the Settlement Manual from Madras he describes the Ryotwari system thus (Volume III, page 130) :—" Under the Ryotwari system every registered holder of land is recognised as its proprietor. He is at liberty to sublet his property or to transfer it by gift, sale or mortgage. He cannot be ejected by Government so long as he pays the fixed assessment, and has the option of (annually) increasing or diminishing his holding or of entirely abandoning it. The ryot under this system is virtually a proprietor on a simple and perfect title, and has all the benefits of a perfect lease without its responsibilities." It is clear from the extracts which I have quoted that the settlement by the Government under the Ryotwari system was with the actual cultivator of the soil whereas in Settlements under Regulation XXV of 1802, the proprietor had only the right to receive rent from persons who were in occupation of the lands Of course there are cases under the Ryotwari system in which certain classes of the community who are not in the habit of tilling the soil have been given a Ryotwari patta. But in such cases a pattadar is the undoubted proprietor of the land with liberty to get it cultivated by leasing it to cultivators. This being the history of the system and the incidents of the system being what I have already described them to be, it seems to me that if a person claims to have acquired occupancy right under a Ryotwari holder, the burden lies heavily upon him to establish it. One other aspect of the question will also lead to the same conclusion. Under Madras Act II of 18.4 the land for which the patta is given is held liable for the payment of revenue. If the patta holder makes

Ponniah Nadan v. Deivanai Ammal.

Seshagiri Aiyar, J

default in paying the revenue the holding can be sold irrespective of the fact that cultivators are on the soil for generations together. There can be no question that the rights of these cultivators would be swept away by the sale for arrears of revenue. This is an indication that the Legislature and the Government of the country do not recognise a permanent occupancy right in the soil under a Ryotwari pattadar.

It is not easy to say what would be the residue of interest that would be left to the ryotwari pattadar if he has the Government above him who can sell the lands under the patta straight away for arrears and if he must recognise an occupancy ryot under him whose interest in the soil must be very considerable. The conception is opposed to the recommendations of those who advocated the ryotwari system. Virtually the occupancy ryot in a Ryotwari village deprives the pattadar of all rights save that of being the recipient of a permanent rent.

Before dealing with the cases which have been quoted at the Bar, I shall refer very briefly to the history of the Ryotwari Settlement in the Tinnevelly District. Contemporaneous with Sir Thomas Munro in the ceded Districts Mr. Hodgson was apparently the Collector of Tinnevelly. As I pointed out before, he was very much against the Ryotwari System. Sir Thomas Munro had induced the Court of Directors to accept his view in preference to the view of the Board of Revenue; subsequently when he was appointed to the Governorship of the Presidency, he directed that the ryotwari system should be introduced in all the Districts. So far as Tinnevelly was concerned we are told attempts were made to introduce this system, from 1827 onwards. By the year 1834 it was introduced in a number of villages (Vide Tinnevelly Gazeteer). But apparently no further progress was made for some time. It was in the year 1861 when Mr. Puchle was the Collector, the Government of the day decided that the district should be surveyed and that the Ryotwari tenure should be introduced at once. From the fact that in 1842 a ryotwari patta was given to the temple we may take it that this was one of the villages upon which the principle was experimented between the years 1827 and 1834. In all probability the predecessors-in-title of Vengu Mudaliar were themselves cultivators of the lands when they were sold to the temple. There is nothing in the history of the

Ponniah Nadan, v. Deivanai Ammal.

Seshagiri Aiyar, J.

system as applied to the Tinnevelly District to lead to the conclusion that prior to the acquisition of the property by the temple the present cultivators had acquired any interest in the lands. That being in short the position of the ryotwari pattadar in the District it seems to me that no special considerations arise in dealing with the lands situated in Tinnevelly different from those which would apply to lands in Tanjore, or Trichinopoly. At any rate there is nothing on the record in this case to lead me to hold that the Tinnevelly cultivator should be treated differently from the cultivator in the other Districts of the southern part of the Presidency.

The facts referred to above establish at least this much that at the time when 5/6th of the lands were sold for arrears of Revenue to Vengu Mudaliar the interest of the cultivator, if any, ceased to exist. Consequently it is clear that they had no subsisting rights when the Mudaliar acquired the property for the temple. Secondly when the Collector in 1842 directed that Ryotwari patta should be granted to the Hukdar, he must have had before him the instructions of the Madras Government contained in the Settlement Manual and in the minutes of Sir Thomas Munro. The inference is that at this time persons who were cultivating the soil had no occupancy right in it. It follows from the above two conclusions that the present cultivators must have been let into possession either by Vengu Mudaliar or by his descendants. Mr. Goldie in the judgment already referred to speaks of 20 or 30 years possession in 1864. This lends support to my view that the appellants' predecessors probably came in as cultivators after the issue of the Ryotwari patta to the Hukdars of the temple. Their occupation was not immemorial as was suggested in the course of the arguments in these appeals.

Now I proceed to consider the decisions that have been quoted. Most of these decisions have been reviewed fully in the judgment which the learned Chief Justice delivered in *Muna Mahammad Rowther* v. *Muthu Alagappa Chettiar* [1]. Therefore I shall not attempt to deal with every one of them. A few of them however require consideration in the light of the history of the Ryotwari Settlement which I have sketched above. *Krishnaswami* v. *Varadaraja, Varadaraja* v. *Venkatachala* [2], was a decision

1. (1917) 34 M. L J 234. 2. (1882) I. L. R. 5 Mad. 345. (F.B.)

Ponniah Nadan v. Deivanai Ammal.

Seshagiri Aiyar, J.

of the Full Bench and in view of the fact that Mr. Justice Muthuswami Aiyar who took part in *Chidambaram Pillai* v. *Thiruvengadathiengar* [1] was also a party to this decision it should be considered with some care. Sir Charles Turner with whose judgment Mr. Justice Muthuswami Aiyer concurred, says at page 357 :—"Without attempting to define what period of occupation should confer a right of occupancy—a matter which can only be dealt with by legislation—we consider ourselves at liberty to say that an occupation for upwards of seventy years is sufficient, *under the circumstances of this case,* to throw upon those who seek to disturb it the burden of showing that the tenancy was not accompanied with a right of occupancy and that the plaintiff has not succeeded in doing so." This passage shows that the learned Chief Justice laid the burden in the first instance upon persons who asserted the right of occupancy, but that in his opinion the facts proved in that case shifted the burden on to the pattadar. In the judgment of Mr. Justice Kinderseley the facts are fully set out and I find that there was a previous litigation in which the right of the tenants to remain on the lands so long as they paid rent regularly was upheld. The learned Chief Justice refers to a number of documents which according to him, evidence an engagement not to eject the tenants from their holdings. It is true that there are observations in the judgment tending to show that a cultivating ryot is entitled to some interest in the soil. In page 357 reference is made to the custom of the country and of the District. No such custom has been sought to be established in this case and I therefore do not think that this decision which proceeded upon the special features of that case and which did not in the first instance throw the burden upon the proprietor is an authority for the proposition contended for by Mr. Narasimha Aiyangar. That this is the correct interpretation of the decision is clear from a reference to *Chidambaram Pillai* v. *Tiruvangadathiengar* [1] to which Mr. Justice Muthuswami Aiyar was a party. In that case the law is laid down in these terms :—" The claim of an occupancy right as overriding the proprietor's right to cultivate his own land is of a special character, and as such it is one which the party, seeking to derogate from the ordinary incidents of property, is

1. (1896) 7 M. L. J. 1.

Ponniah Nadan v. Deivanai Ammal.

Seshagiri Aiyar, J.

bound to establish. Mere length of enjoyment in the capacity of tenants or *purakudies* irrespective of other circumstances is not *prima facie* proof of occupancy right." I have shown already what the incidents of a ryotwari tenure are, and the judgment in *Chidambaram Pillai* v. *Thiruvengadathiengar* [1] entirely supports the view I have taken. When we remember that Muthuswami Aiyar, J., was first a Deputy Collector, and afterwards an Inam Commissioner, the value of his pronouncement acquires very great weight. This view of the burden of proof was accepted unreservedly by Shephard and Subramania Aiyar, JJ., in *Cheekati Zemindar* v. *Ranasooru Dhara* [2]. In *Rangaswami Reddi* v. *Gnana Sambanda Pandara Sannathi* [3], Mr. Justice Subramania Aiyar and Mr. Justice Moore acted on that view. Mr. Justice Moore quoted the passage which I have already cited and accepts it as good law. Mr. Justice Sadasiva Aiyar and Mr. Justice Napier in *Naina Pillai Marakkayar* v. *Ramanathan Chettiar* [4] have examined the case-law very fully and have accepted the conclusions stated in *Chidambaram Pillai* v. *Thiruvengadathiengar* [1]. We have a very full discussion by the learned Chief Justice and Sadasiva Aiyar, J., in *Muna Muhammad Rowther* v. *Muthu Alagappa Chettiar* [5] wherein the principle enunciated in *Chidambaram Pillai* v. *Thiruvengadathiengar* [1] is accepted and re-stated. As against these decisions, Mr. Narasimha Aiyangar quoted *Viravan Ambalam Periakaruppan Ambalam* v. *Annaswami Aiyar* [6], *Venkatachella Goundan* v. *Rangaratnam Aiyar* [7] and *Muthusami Aiyar* v. *Naina Ammal* [8]. As regards *Viravan Ambalam Periakaruppan Ambalam* v. *Annaswami Aiyar* [6] it is enough to say that the proposition therein laid down is not disputed by those who allege that the burden of proof is upon the person claiming occupancy right. What the learned Judges say is that it should not be laid down that in all cases of ryotwari lands a cultivating tenant cannot have a right of occupancy in the lands. This contention is not advanced now. It is no doubt an anamolous position. But it is easy to conceive of a grant of occupancy right which is only in other words a permanent lease by a ryotwari holder in favour of a cultivator. Such leases are very common in South Kanara.

1. (1896) 7 M. L. J. 1.
2. (1899) I. L. R. 23 Mad. 218.
3. (1898) I. L. R. 22 Mad. 264.
4. (1917, 33 M. L. J. 84.
5. (1917) 34 M. L. J. 234.
6. (1911) 21 M. L. J. 845
7. (1913) 24 M. L. J. 571.
8. (1917) 7 L. W. 194.

Ponniah Nadan v. Deivanai Ammal.

Seshagiri Aiyar, J.

It is also imaginable that the limited right of holding the land on payment of a fixed rate of rent with the incidents of occupancy right may be acquired by a cultivator. Therefore it is not necessary to say that under no circumstances can an occupancy right be acquired against the ryotwari proprietor. Therefore the proposition which is stated in *Viravan Ambalam Periakaruppan Ambalam* v. *Annaswami Aiyar* [1] seems to be unexceptionable as far as it goes. It is in *Venkatachella Goundan* v. *Rangaratnam Aiyar* [2] that a further extension seems to have been attempted. In this latter case the learned Judges, quoting without disapproval the dictum of Muthuswami Aiyar, J. in *Chidambaram Pillai* v. *Thiruvengadathiengar* [3] and also the statement of law contained in *Rangasami Reddi* v. *Gnana Sambanda Pandara Sannathi* [4] and *Cheekati Zemindar* v. *Ranasooru Dhara* [5] say :—"There is nothing in the observations above cited to warrant the opinion that in the case of every Ryotwari village there is necessarily a presumption that a ryot holding under a *Mirasdar* has no occupancy right." If the judgment stood there, no exception can be taken to it. But almost towards the end, the learned Judges seem inclined to hold that the burden is upon the proprietor to show that a cultivator who has been long on the land has not acquired a right of occupancy. It seems to me that this proposition is not warranted by the decisions which the learned Judges have quoted without dissent in the body of their judgment. I will not examine this case any further as we were told that it is under appeal to the Privy Council. Now I come to the last case quoted before us, *Muthusami Aiyar* v. *Naina Ammal.* [6] There are two statements in it; one is that the Second Appellate Court is bound by the findings of fact on the question of occupancy right at which the District Judge has arrived. If the judgment has been based upon that view of the functions of the Second Appellate Court, no exception could be taken to the conclusion arrived at in this case. But the learned Judges also proceed to lay down the principles upon which the case should be decided. I cannot help observing that in the body of the judgment the use of the words *tenant* and *landlord* which is the very fact to be established by

1. (1911) 21 M. L. J. 845.
2. (1913) 24 M. L. J. 571.
3. (1896) 7 M. L. J. 1.
4. (1898) I. L. R. 22 Mad. 264.
5. (1899) I. L. R. 23 Mad. 318.
6. (1918) 7 L. W. 194.

Ponniah Nadan v Deivanai Ammal.

Seshagiri Aiyar, J.

the evidence has to some extent clouded the issue to be decided. The expressions *tenant* and *landlord* have special meanings assigned to them in our legislative enactments. One feels, on reading the decision, as if the principle applicable to cases under the Estates Land Act has been unconsciously adopted in the disposal of the case. No doubt *Muthuswami Aiyar* v. *Naina Ammal* [1] is based upon *Viravan Ambalam Periakaruppan Ambalam* v. *Annaswami Aiyar* [2] and *Venkatachella Goundan* v. *Rangaratnam Aiyar* [3]. I have stated my opinion about these two decisions. With all respect, I am not prepared to accept the principle as to onus enunciated in *Muthusami Aiyar* v. *Naina Ammal* [3]. I prefer to follow the view taken by Collins, C. J., Muthuswami Aiyar, J., Shepherd, J., Moore, J., Subrahmania Aiyar, J., Sadasiva Aiyar, J., Napier, J., and by the learned Chief Justice. In my opinion the burden is upon the cultivators to show that they have got an occupancy right in these ryotwari lands which have been taken up by Government under the Land Acquisition Act and the evidence they have let in is not sufficient to discharge that burden. I therefore agree with the District Judge that they are not entitled to compensation on the footing of being occupancy tenants. At the same time I think that in respect of their interest in the land as tenants from year to year, they are entitled to have their share of the compensation apportioned; and we fix it at one anna in the rupee. Subject to this modification we dismiss the appeals with costs. The vakil's fee will be Rs. 352 in all the appeals together.

A. V. V.

PRIVY COUNCIL.

PRESENT :—LORD ATKINSON, SIR JOHN EDGE, MR. AMEER ALI AND SIR LAWRENCE JENKINS.

[On appeal from the Court of the Judicial Commisssioner, Central Provinces.]

Seth Ghunsham Das and others ... *Appellants* *

v.

Uma Pershad and others ... *Respondents.*

P. C.

Seth Ghunsham Das v. Uma Pershad.

Fraudulent transfers—Tests to be applied in determining the genuineness or otherwise of a transaction which is impeached—Facts must be weighed as a whole—Books of account—Mere regularity or book entries not of much value.

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* 12th, 14th and 15th November, 1918.

1. (1918) 7 L. W. 194.
2. (1911) 21 M. L. J. 845.
3. (1913) 24 M. L. J. 571.

P. C.

Seth Ghunsham Das *v.* Uma Pershad

In determining whether a particular transaction impeached as a fraud upon creditors is genuine or otherwise it is essentially necessary that the facts should be considered in relation to each other and weighed as a whole. It is a fallacious method to consider separately each fact which militates against the *bona fides* of the transaction, and which by itself may be susceptible of explanation.

In the present case the secrecy and haste with which the document was executed, the subsequent negotiations for a composition with the creditors on a payment by them to get the mortgage effected by the document revoked, the non-production of material books, the unsatisfactory nature of the evidence as to the settlement of accounts on which the mortgage was based, the relationship of the parties, and the reservation of the entire usufruct of the immovable properties for the wife and children of the debtor were held by their lordships to prove irresistibly that the mortgage was in fraud of creditors.

The mere formal regularity of entries in books of account is in such cases of little value.

Consolidated appeals from five decrees, dated March 16, 1907 of the Judicial Commissioner of the Central Provinces, reversing a decree of the Civil Judge of Jubbulpore.

The facts are sufficiently stated in their Lordships' judgment. In this appeal the main question was whether a usufructuary mortgage, executed by Dhanrup Mal in favour of his uncle Chand Mal was a real and *bona fide* transaction made for valuable consideration (a sum of Rs. 90,000 alleged to have been found due on a settlement of accounts) or was a mere cloak for shielding the mortgaged property from Dhanrup Mal's creditors. The trial Judge, the Civil Judge of Jubbulpore, held that the transaction was a genuine one: but the Judicial Commissioner, Mr. H. J. Stanyon, took the opposite view. In the course of a lengthy judgment he observed:

"The broad question set to me is whether the mortgage transaction is collusive and fraudulent—a mere conspiracy to shield the property concerned from alienation to meet the just debts of Dhanrup Mal or whether it is a genuine contract made for good consideration which merely represents that Dhanrup Mal's largest creditor has secured an advantage over all other creditors of that bankrupt. It seems to me that in dealing with the evidence, direct and circumstantial, from which the answer to this question is to be derived, I must regard it as a whole. The District Judge has dissected it very minutely, and has regarded each fact and circumstance telling against the deed in detail, judging its weight and force by itself. He does not appear to have considered the evidential value of, or the presumption arising from, the collective effect of the various items. It is necessary to consider all the circumstances attending the execution of the deed, and the nature of the transaction itself, and see whether they are such as to rebut the ordinary presumption of fair dealing."

P. C.

Seth Ghunsham Das v. Uma Pershad.

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"Yet another important point for consideration is that the landed estate mortgaged yields about Rs, 2,400 a year, which is the equivalent of the annuity which, under the deed, the mortgagee binds himself to give to the wife and sons of the mortgagor. The District Judge made the very unusual concession of allowing the learned counsel for the plaintiff, on the date of arguments, after all evidence was closed, to produce a statement, drawn from entries in the bankrupt's books, to prove that, though village income proper in the four years preceding the suit was only Rs. 2,400 a year, yet in four earlier years it, and the profits derived from money-lending were, on an average, Rs. 5,590 a year; and this satisfied the District Judge that the deed was not a mere settlement of Dhanrup Mal's estate on his wife and sons. I wholly disagree with this view. It is an admitted fact that, as a banker, Dhanrup Mal had failed, and with public confidence in his solvency and honesty destroyed, no expectation could be formed of any early revival of his money-lending business. Such business requires a capital outlay, and the District Judge's view of the matter seems to leave that out of calculation altogether. The vague conjecture as to famine and bad years is equally beside the point in the absence of clear evidence to show how any such visitation affected the ordinary income of the particular property concerned. Loose conjectures of this kind indicate prejudice rather than judgment. It is natural that the income of the mortgaged estate should be estimated at the date of the mortgage, not by what it had been in better times, but by what it had proved to be in the year or two immediately preceding the transaction. That is the income to which the mortgagee would be willing to bind himself, if, in fact, the main object was to make him the shield behind which, or the channel through which, the bankrupt and his family were to continue to enjoy his property at the expense of his creditors. The income from grain dealings and money-lending was included in the bond because the bond was clearly intended to cover everything connected with the villages; but that does not show that anything more than the good will of a bankrupt was conveyed; money and grain in future years could only be found by Chandmal out of his own pocket, and the right to lend and make profit on them was not a pecuniary asset which came out of Dhanrup Mal's estate in the same way as the rents and produce of the land. It is then a material element of consideration that, notwithstanding his astuteness, his haste, and his secrecy, in obtaining satisfaction for the large sum of Rs. 90,900 allegedly due to him by his bankrupt nephew, Chandmal confined this usufructuary mortgage to a property

P. C.
Seth Ghunsham Das v. Uma Pershad.

which, *of its own strength*, could only be expected to yield an average income of Rs. 2,400 a year, and that he assigned the whole of this income to the wife and sons of the mortgagor. No amount of special pleading or puerile quibbling can get rid of the serious doubt as to the reality of the mortgage transaction which is raised by this significant circumstance.

The lower Court has been much impressed by the regularity of the accounts as disclosed by the failure of several experts who examined them to find any irregularities. But this circumstance does not go very far with me. The plaintiff and Dhanrupmal and most of their accountants are Marwaris by caste, and professional book-keepers. It cannot be suggested that their dealings were wholly unreal, but it is well within the range of judicial experience in dealing with this class that they can, by a systematic manipulation of book entries, give every appearance of reality to transactions which have no existence outside those entries. The facility of such procedure, where debits in books which are produced can be regularly balanced by credit entries in books which are not produced, is manifest. If the apparent debt secured by the bond in suit is not a real debt, it could readily be adjusted by an entry to Dhanrupmal's credit in the private or joint accounts, or by one or more entries in other partnership or severalty shops outside British India. Nothing would be easier in such a system as is here disclosed for losses to be gradually allotted to one partner and profits to another if fraudulent bankruptcy was resorted to as a source of gain ; or, if one member really made bad investments so that his separate business failed, nothing would be simpler than, by a system of regular but unreal entries in account books, to defeat his real creditors and withdraw his available assets as it were into the family fold. I do not assert that either of these courses has been followed here : but while they remain possible, it is indispensable that everything should be brought into the light of day which may go to show that they have not come into existence. I notice from the Report of the Commissioner that the latest *Tisira Bahi* produced was that of Sambat 1954. This was the year in which Dhanrupmal professed bankruptcy and executed the mortgage-deed in suit. It was very necessary to see what took place in connection with the joint property and income after this time. Yet it is just here that plaintiff has chosen to shut out information."

For these and other reasons given in his judgment the learned Judicial Commissioner held that the plaintiff, who sought in this suit to enforce the mortgage deed against the mortgagor's creditors, had failed to prove that the transaction was for valuable consideration : and that since the onus of proving such consideration was upon him,

P. C.
Seth Ghansham Das v. Uma Pershad.

the deed must for the purposes of the present suit, and as between the plaintiff and Dhanroopmal's other creditors, be treated as one without consideration. He accordingly dismissed the suit. Hence this appeal.

A. M. Dunne, K. C. (with him, *J. M. Parikh*), for appellants submitted that the finding of the Court of First Instance was correct. The plaintiff had produced a large number of account books which the Lower Courts had found to be regularly kept in the mahajani style and in the proper course of business. After the lapse of years it was practically impossible to prove the accuracy of each entry, nor should such proof be expected. The entries in the books were sufficient evidence to prove that the debt set out in the mortgage was really due from the mortgagor to the plaintiff. The fact that an account was made of a few items after the settlement of the main liability did not militate against the genuineness of the transaction. The Judicial Commissioner, in differing from the trial Judge, had proceeded largely on suspicion.

De Gruyther, K.C. and *Dube*, for respondents, were not called on.

Their Lordships' judgment was delivered (January 23, 1919) by

Mr. Ameer Ali.

Mr. Ameer Ali.—These five consolidated appeals from a judgment and decrees of the Court of the Judicial Commissioner of the Central Provinces arise out of five suits brought in the Court of the District Judge of Jubbulpore by one Chandmal since deceased. The appellants before the Board are his representatives. The object of the suits in each case was to set aside certain orders for attachment before judgment obtained by a number of creditors of one Dhanroopmal who, the plaintiff alleged, had already conveyed to him by an usufructuary mortgage the properties attached, in consideration of a debt owing to him from Dhanroopmal. The creditor-defendants on the other hand alleged that the mortgage in question was executed in collusion with the plaintiff as a device to defeat the claims of Dhanroopmal's creditors and to retain the properties wholly or partly for the benefit of Dhanroopmal or his family.

The District Judge before whom the suits came for trial in the first instance held that the mortgage to the plaintiff represented a *bona fide* transaction and accordingly set aside the orders for attachment.

The Additional Judicial Commissioner on appeal arrived at a totally different conclusion. Viewing the circumstances as

P. C.

Seth Ghunsham Das v. Uma Pershad.

Mr. Ameer Ali.

a whole he has held against the *bona fides* of the mortgage; and reversing the District Judge's orders dismissed the plaintiff's suits. From these decrees Chandmal's representatives have appealed to His Majesty in Council.

The facts of the case are set out at length and with considerable lucidity in the judgment of the Appellate Court. For the purposes of their Lordships' decision it is, therefore, enough to give only a short outline of the history of the transaction in dispute and of the grounds on which it is impeached.

The deceased plaintiff Chandmal and Dhanroopmal were related to each other as uncle and nephew. They were members of the well-known Marwari caste of money-lenders, and the family carried on money-lending and banking business on an extensive scale in various parts of British India. The ramifications of their financial operations are very clearly stated in the following passage of the Additional Judicial Commissioner's judgment :—

"What, however, is manifest and indisputable from Dhanroopmal's statement is that the members of the entire Marwari family, whose genealogical tree heads this judgment, are in the closest commercial relations with one another— that they have numerous shops in various parts of India, carrying on money-lending business, and holding landed property under names and styles which do not always indicate the true owners thereof. Some are called by the names of deceased ancestors : in some we find joined together the names of the living and the dead : in others we find the name of a single adult : in yet others we find business carried on by the adults in the names of minors who have no hand in the management. Some of the shops are the joint or partnership property of all; in some two members are partners : others again appear as the exclusive property of a single member. Many of these various branches have dealings with one another, and the books as to those dealings are of course regularly kept in the ordinary course of business, and are capable at any given time of showing one branch in debit to another. A few examples will suffice to support the above assertion. The Jubbulpore firm, which is described as the exclusive property of Dhanroopmal, went by the names of Raghunathdas Hamir-mal—both dead men. A partnership firm in Bombay, owned by Chandmal, Kanakmal and Dhanroopmal, went by the names of the first two. Dhanroopmal states that he had a firm in Bombay bearing the names of Karanmal, Bagmal, which were the names of two of his three minor sons; while Chandmal had a firm called Raghunathdas Chaganmal being called after Chandmal's deceased grandfather and Chandmal's minor son. In Ajmere Dhanroopmal claims to own a firm called Chandmal Dhanroopmal. In Sambhar, Aligarh, Bhilsa and other places Dhanroopmal and Kanakmal have or had joint firms. In Piparia such a joint firm goes by the name of Kanakmal only. It is also not disputed that, though a partition of some assets has been found to have taken place in Sambat 1933, a portion of the original joint family estate remains undivided. The details and extent of this property, who is now in possession of it, and how the income is applied are facts which it was most important to have cleared up, but they are facts which the plaintiff and Dhanroopmal have carefully suppressed in this suit."

P. C.

Seth Ghunsham Das v. Uma Pershad.

Mr. Ameer Ali.

The family, consisting of Chandmal and his two brothers Dhirajmal and Chandanmal and their children, were at one time joint, but in 1877 there appears to have been a separation. There is no question, however, that a substantial portion of the family properties and outstandings were left joint and with regard to these the accounts were kept quite apart from the properties and businesses owned by each branch of the family. These accounts were called "tisira bahis" or "Three Share Accounts." It may be mentioned here that Dhanroopmal is the son of Chandanmal, and Kanakmal, whose name also occurs frequenty in the case, is the son of Dhirajmal.

Chandmal and Dhanroopmal had in Bombay, among other places, two separate businesses. The names under which they were carried on are not material. Dhanroopmal carried on business on a large scale also at Jubbulpore. He appears to have enjoyed the confidence of the residents and many people placed with him on deposit considerable sums of money It is also clear that Dhanroopmal's "shop" at Bombay was extensively financed by Chandmal's "shop" in Bombay with the result that in 1898 it found itself heavily indebted to Chandmal.

About the beginning of September, 1898, Dhanroopmal's shop in Jubbulpore suspended payment. In the meantime his creditors had commenced suits for the recovery of their monies. Whilst his affairs were in this critical condition he executed on the 26th September the mortgage in dispute in favour of his uncle Chandmal, which covered all his properties inclusive of his immoveable properties in Jubbulpore. There is no question that the document was executed in great hurry and with much secrecy. The stamp paper was procured from Agra, while the parties resided at Ajmere and the properties were situated at Jubbulpore. The allegation is, and the document recites, that it was in consideration of a sum of Rs 90,900 which was found due after certain remissions on account of the advances made by Chandmal's business in Bombay to Dhanroopmal. It is not altogether clear when the account was actually adjusted; certainly it did not represent the result of a final adjustment for various sums were subsequently found due and are said to have been remitted. After the execution of the mortgage deed there were negotiations between the creditors and Dhanroopmal's agent at Jubbulpore for some sort of composition with the creditor. At

P. C.

Seth Ghunsham Das v. Uma Pershad.

Mr. Ameer Ali.

the meetings held for the purpose of discussing the terms of composition or at least at some of them, Chandmal's representative was present. He certainly knew of the negotiations and there can be little doubt that Chandmal was informed of them. Dhanroopmal appears to have insisted that the creditors should make a payment of Rs. 15,000 to enable him to get the mortgage revoked. The creditors were not willing and the negotiations fell through. In the meantime the creditors who had already brought suits for recovery of their moneys proceeded to attach Dhanroopmal's properties in Jubbulpore. Chandmal put in a claim in each action under S. 278 of Act XIV of 1882 (the old Civil Procedure Code) for their exemption from attachment on the ground that they were in his possession in his own right under the mortgage. These claims were summarily rejected on the 10th of May, 1901. Chandmal lay by for a year; on the 10th of May 1902, just before the day the period of limitation was to expire he instituted the present actions in the Court of the District Judge. It will be seen from the above summary of facts that the sole question for determination in the case is whether the mortgage was a *bona fide* transaction entered into with the object of securing the debt of Chandmal or whether it was a mere contrivance for defeating or delaying the just claims of the other creditors and retaining the properties for the benefit of or in trust for Dhanroopmal.

The District Judge rightly threw on the plaintiff the onus of establishing that the transaction was entered in good faith. In dealing with the case, however, he seems to have fallen into an error. He took each fact which militated against the *bona fides* of the mortgage separated from the rest of the facts and proceeded to domonstrate that is was quite consistent with good faith and by this process he arrived at the conclusion to which their Lordships have referred. The course adopted by the District Judge was patently erroneous; for in a case like the present it is essentially necessary that the facts should be considered in relation to each other and weighed as a whole. This was done by the Additional Judicial Commissioner with the contrary result.

In support of his case the plaintiff produced an enormous number of account books consisting of, it is said, two cartloads. The District Judge referred the examination of these books to

P. C.

Seth Ghunsham Das v. Uma Pershad.

Mr. Ameer Ali.

the representative of a native banking firm of high repute, whose character for honesty has not been impugned. This gentleman appears to have examined the books with great labour and care; assisted by the pleaders on both sides; the result of this examination he embodied in a report which he submitted to the District Judge, who does not seem to have been satisfied with it. In his report the Commissioner had pointed out various circumstances which seemed to him to throw grave doubts on the *bona fides* of the transaction between Chandmal and his nephew. Large extracts from the report are given in the Judicial Commissioner's judgment. Their Lordships would like to refer to one passage only :—

"Whether Dhanroopmal had property other than that mortgaged at the time of mortgaging this property cannot be correctly ascertained, because Rai Seth Chandmal has not produced the account book which contains (a record of) the joint property. Although Jankipershad applied for the production thereof, Rai Seth Chandmal did not produce it, and his agent states there is no such book. There may not be any such book, as alleged by the agent, yet there must be some memoranda in which the joint property is entered. From the Tisira books it is apparent that there is some memorandum from which items have been carried over, into the Tisira Bahi. For example, how else could it be known that the Rajah of Bikanir owed Rs. 2,00,001 which was realised from him and was divided between the three? From the Tisira Bahi khatas it can be seen how much was paid and received, but it cannot be ascertained what amount of joint outstandings and property the three men possess. The nakal of the Tisira Bahi, which is produced, is made up of old and new pages: from pages 1 to 44 it is of old paper, from pages 45 to 92 it is of new, and again from pages 93 to 100 it is of old. It also contains an account on which a stamp is fixed. The rokad (day-book) of tisira is written up to Sambat, 1939 ; the remainder of the debit and credit items are written up in the nakal bahi (transcript or fair copy of original day-book)"

On this the Judicial Commissioner rightly observes as follows:—

"I think there can be no doubt that this report was intended to show that while the accounts which the plaintiff chose to submit for examination, showed, *upon arithmetical comparison* of the entries found therein, a sum of Rs. 90,900 standing to the debit of Dhanroopmal, and the accounts were kept in accordance with mercantile regularity, it was impossible to say that the sum represented a real debt.

(*a*) Because the whole of the accounts between the parties had not been produced;

(*b*) Because various sums had been left out of account which ought to have been included ; and

(*c*) Because, in fact, the accounts were still open on the date of the deed, the consideration for which was fixed by guess work."

The District Judge has treated the circumstances to which the Commissioner felt his duty to call attention as "objections"

P. C.

Seth Ghunsham v. Uma Pershad.

Mr. Ameer Ali.

on his, the Commissioner's part, and he proceeded to demolish them. Their Lordships have carefully studied the report in conjunction with the Commissioner's evidence, but have not been able to discover any inconsistency likely to discredit the Commissioner's testimony. What he says in substance is that although the books produced showed a balance of Rs. 90,900 against Dhanroopmal it was impossible to say, considering the multiplicity of their dealings and the non-production of the books relating to the properties that were still joint, that the balance shown represented a real debt.

One outstanding fact in connection with this transaction remains unchallenged. It is a usufructuary mortgage but the entire usufruct of the immoveable properties mortgaged, the only really available assets of Dhanroopmal, was reserved for his wife and children. The clause which provides this deserves attention. It runs thus :—

"As the whole of the mortgaged property is an ancestral one and as the support of my wife Musst. Bhur Kuar and my sons Kuar Karanmal, Jasmal and Bagmal is dependent on it, the sons and their mother will therefore be entitled to receive a monthly allowance of Rs 200 and Rai Seth Chandmal will, from the date of his entering into possession of the villages, etc., and until such time as he remains in possession thereof, pay without any objection the money either through Musst. Bhur Kuar their mother or Karanmal their real brother. In case Kuar Karanmal or their mother leave Ajmer for some other place the Seth Sahib will be remitting money to them at that place."

Their Lordships agree with the Appellate Court that the District Judge's estimate of the income arising out of the properties was hypothetical and based on assumptions for which there were no valid grounds.

It should be remembered in this connection that even if the properties were ancestral the interest of Dhanroopmal's sons were liable for the payment of his debts which were not incurred for immoral purposes.

In their Lordships' opinion when the facts are considered as a whole, there can be little doubt that the mortgage was a mere device for reserving the bulk of the available assets of Dhanroopmal for the benefit of his family and indirectly for himself. The secrecy and haste with which the document was executed, the subsequent negotiations for a composition with the creditors on a payment by them to get the mortgage revoked, the non-production of material books, the unsatisfactory character of the

P. C.

Seth Ghunsham Das v. Uma Pershad.

Mr. Ameer Ali.

evidence relating to the adjustment, above all the reservation of the entire usufruct of the immoveable properties for the wife and children of the debtor, not to speak of the relationship of the parties which in other circumstances might not be very material, all tend to the conclusion at which their Lordships have arrived. On the whole their Lordships concur with the very able judgment of the Additional Judicial Commissioner, and are of opinion that these appeals should be dismissed with costs. And they will humbly advise His Majesty accordingly.

Solicitor for Appellants :—*E. Dalgado.*

Solicitors Respondents:—*Barrow, Rogers and Nevill.*

A. P. P.

PRIVY COUNCIL.

PRESENT :—LORD BUCKMASTER, LORD DUNEDIN, SIR JOHN EDGE AND SIR LAWRENCE JENKINS.

[On Appeal from the High Court of Judicature at Madras.]

P. C.

Rangasami Gounden v. Nachiappa Gounden.

Rangasami Gounden ... *Appellant* *

v.

Nachiappa Gounden ... *Respondent.*

Hindu Law—Widow's estate—Widow's powers of surrender and alienation distinguished—Surrender must be absolute—Consent of reversioner to alienation by widow, effect of—Reversioner taking mortgage from alienee—Whether it precludes him from subsequently questioning alienation.—

A distinction must be drawn between a Hindu widow's power of surrender or renunciation, and her power of alienation for necessity.

A Hindu widow can renounce in favour of the nearest reversioner, if there be only one, or of all the reversioners nearest in degree. In this case she accelerates the estate of the heir by conveying absolutely and destroying her life estate. But such surrender must be not only absolute but complete, the reason being that it is based on the effacement of the widow. Such surrender can only be in favour of the nearest reversioner or reversioners.

An alienation may be in favour of anyone, but to prevail beyond the widow's life-time it must be for necessity.

The consent of the reversioners to an alienation by the widow does not operate *proprio vigore* to validate it, but it affords presumptive proof of necessity. Such presumption can however be rebutted.

Held, therefore, that a deed of gift by the widow could not be validated by any consent of the reversioners.

A presumptive reversioner is not bound to challenge an alienation by a widow at its inception : he is entitled to wait till the reversion falls in.

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* P. C. A. No. 32 of 1917. 31st October and 16th December 1918.

P. C.

Rangasami Gounden v. Nachiappa Gounden.

By taking from the alienee a mortgage of property which includes part of the property alienated such a reversioner does not preclude himself from disputing the validity of the alienation on the widow's death.

Bajranji Singh v. *Manokarnika Baksh Singh* [1] discussed.

Appeal from a decree of the Madras High Court, dated November 29, 1914, modifying a decree of the same High Court affirming that of the District Judge of Salem.

The judgment of the High Court is fully reported in 28 M. L. J. 1.

The facts are sufficiently stated in their Lordships' judgment. The present appeal related only to a small part of the property included in the original suit, *viz.*: a share in Kongapuram Mitta, which share Marakammal, the widow, had transferred by a deed described as a deed of gift to Rangasami Gounden, then the nearest reversioner, who predeceased her. This Rangasami's heirs sold to the present appellant Rangasami two small properties included in the deed of gift, and also mortgaged to him (with other property) the share of Kongapuram Mitta.

In the High Court Sadasiva Aiyar, J., held that the deed of gift was in itself good, on the ground that a partial alienation by a widow to the nearest reversioner is valid in law when he is a male, and gives him full ownership rights in the alienated property. He based this proposition on the Board's Judgment in *Bajranji Singh* v. *Manokarnika Baksh Singh* [1].

The Judges (Sir John Wallis, Chief Justice, Seshagiri Aiyar and Kumaraswami Sastri, JJ.) who heard the Letters Patent appeal did not agree with this proposition, but they held that plaintiff was estopped from denying the validity of the deed so far as the property mortgaged to him was concerned. They therefore modified the original decree by dismissing the suit so far as it related to that property.

Hence this appeal.

Dunne, K. C. (with him *Dube*) for appellant:—The deed was a gift, not an alienation for consideration. A relinquishment by the widow to the next reversioner is not good against the other reversioners, unless it is an absolute transfer of the whole estate: *Behari Lal* v. *Madho Lal* [2], *Marudamuthu Nadan* v. *Srinivasa Pillai* [3], *Debi Prasad Chowdhury* v. *Golap Bhagat* [4]. This proposition is not affected by the decision in *Bajranji Singh* v. *Manokarnika Baksh Singh* [1].

The only case in which an alienation of part of the estate is made good by consent of the reversioners is where it is an alienation for consideration. In that case, the consent raises the presumption

1. (1907) L. R. 35 I. A. 1=30 All. 1=17 M. L. J. 605.
2. (1891) L. R. 19 I. A. 30=19 C. 236.
3. (1898) I. L. R. 21 Mad. 128.
4. (1913) I. L. R. 40 C. 721, 753.

P. C

Rangasami Gounden
v.
Nachiappa Gounden

that the alienation was for necessity. No such presumption can arise in the case of a gift. *Bakhtawar* v. *Bhagwana* [1], *Abdulla* v. *Ram Lal* [2] and *Pilu* v. *Babaji* [3].

Assuming that the reversioner's consent mattered, there is here no such evidence of it as the law requires. *Jivan Singh* v. *Misri Lal* [4] *Hari Kishen Bhagat* v. *Kashi Pershad Singh* [5].

The fact that appellant had taken a mortgage of part of the alienated property does not preclude him from impugning the alienaation when the succession opened to him: till then his right was only inchoate.

De Gruyther, K. C. (*Kenworthy Brown* with him) for respondent: The deed was not really a deed of gift: it was in consideration of claims for expenses therein referred to.

(*Dunne*: That point was abandoned in appeal)

It was not clearly abandoned: indeed, Kumaraswami Sastri. J., expressly found that it was a transfer for consideration. In this case there *was* necessity: the costs referred to were at least Rs. 4,000.

As to the point that this was not the whole estate, for all practical purposes it was. Must the whole estate mean every single penny the widow had, or is it simply the whole of her interest in the estate? *Behari Lal's case* [6] (supra) only proves the latter. I submit that a voluntary alienation for consideration by a widow with the consent of the next reversioner for the time being may be good even though it be of part only-vide judgment of Jenkins, C. J., in *Debi Prasad Chowdhury* v. *Golap Bhagat* [7].

The latest cases in Madras show that the consent of the next reversioner to the alienation even of a part makes it good against him. *Rangappa Naik* v. *Kamti Naik* [8], *Muthuveru Madaliar* v. *Vithilinga Mudahar* [9] and *Narayana* v. *Rama* [10]. The same has been held elsewhere. *Mallik Sahib* v. *Mallikarjunappa* [11], *Pulin Chandra Mandal* v. *Belai Manda* [12]. I rest my case on *Bajranji Singh* v. *Manokarnika Baksh Singh* [13].

(*Lord Buckmaster*: But there is no question as to the law, where the transaction is for consideration. The doubt is when it is a gift).

Upon the facts plaintiff is not entitled to say the deed is inoperative against him. He knew what the position was as to the litigation

1. (1910) I. L. R. 32 All 176.
2. (1911) I. L. R. 34 All. 129.
3. (1909) I. L. R. 34 Bom. 165.
4. (1895) L. R. 23 I. A. 3.
5. (1914) L. R. 42 I. A. 64.
6. (1891) L. R. 19 I. A. 30.
7. (1913) I. L. R. 40 C. 721 at p. 745.
8. (1908) I. L. R. 31 Mad. 366=18 M. L. J. 309.
9. (1908) I. L. R. 32 Mad. 206.
10. (1913) I. L. R. 38 M 396 402=25 M. L. J. 219, 224.
11. (1918 I. L. R. 38 Bom. 224.
12. (1908) I. L. R. 35 Cal. 939
13. (1907) L. R. 35 I A. 1,

P. C.
Rangasami Gounden v. Nachiappa Gounden.

recited in the deed. He knew well the title to the property which he sold and mortgaged, for he had been a party to the partition suit in which the widow got it. When a widow alienates without necessity the next reversioner has the option of consenting or not consenting. *Madhu Sudan Singh* v. *Rooke*. [1]

Is not his taking a mortgage equivalent to consent?

[*Lord Dunedin*: I don't see that. I buy in order to make sure of getting, whatever happens. If you can show that you are *potior jure*, that may displace any inference of recognition.

Lord Buckmaster;—In Chancery there is no such thing as the Statute of Limitations, but the same principles apply. Once you establish that a man is aware of his rights laches come in.

Lord Dunedin:—Take a possible reversioner who learns the facts. The widow lives another 20 years. You don't say that he is bound when he becomes reversioner?]

No.

(*Lord Dunedin*:—Then we only have to consider if he did anything after the widow's death.)

I say (1) the transaction was not a gift, (2) if a gift, there was consent validating it, (3) if a gift without such consent, there has within reasonable limits been a surrender of the whole estate. The transaction was in 1893. Plaintiff in 1896 had the chance of affirming or repudiating it: by purchasing from the alienee's sons he affirmed it.

(*Lord Buckmaster*:—There is much to be said for the view that when the man knows all the facts he must either affirm or disavow, and he may have done something inconsistent with disavowing. But I don't see how it can be estoppel: he did not induce you to change your position in any way.)

Kenworthy Brown, followed: *Bajranji Singh* v. *Manokarnika Baksh Singh* shows that the consent of the reversioner subsequent to the transaction will suffice.

Dunne in reply:—There are findings of all the Courts in India that the transaction was a gift, and not an alienation for consideration. On the facts there is no doubt that the deed did not convey anything like the whole estate.

Their Lordships' judgment was delivered (December 16, 1918) by

1. (1897) L. R. 24 I. A. 164.

P. C.

Rangasami Gounden v. Nachiappa Gounden.

Lord Dunedin.

Lord Dunedin.—The subjoined pedigree will explain the position of the persons to be mentioned.

- Sengottuvela Goundan
  - By his first wife
    - Nachi Gounden.
      - Kylasa Gounden.
        - Nachiappa Gounden, *3rd Defendant.*
  - By his second wife.
    - Semba Gounden.
      - Nachiappa Gounden.
        - Rangasami Gounden, *Plaintiff*
    - Nachi Gounden, *dead.*
      - Nachiappa Gounden, *dead.*
        - Arthanari Gounden, *1st Defendant.*
          - Nachiappa Gounden, *2nd Defendant.*
      - Ramasami Gounden, *Alienee, dead.*
    - Arthanari Gounden, *dead*= *Marakammal, widow.*
      - Ramasami Gounden, *dead, last male holder.*

This suit is brought by the plaintiff as one of the reversionary heirs entitled to one-half of the property last held by Marakammal, the widow of Arthanari Gounden, who had succeeded thereto as upon the death of her childless son, Ramasami Gounden. It was directed against 32 persons who were in possession of different pieces of the property. The suit was only contested by three defendants. The third defendant, who was only of the half-blood, as the pedigree will show, was held on that account to have no claim as a reversionary heir, and that finding is acquiesced in. He may be therefore dismissed from further notice. The first and second defendants were reversionary heirs, and as such entitled to the other half. But they were also in possession of two-fifteenths of an estate called Konganapuram Mitta, one-fifteenth of which was claimed by the plaintiff, and they resisted this claim. The first defendant is now dead, and the second defendant is in his right and is the sole respondent before the Board.

The grounds on which the claim was resisted arise out of the following facts. After the death of her husband Marakammal entered into possession of the estate. At that time Ramasami Gounden (designated in the pedigree as the "alienee") was the nearest reversionary heir. Marakammal executed in 1893 in his favour a conveyance of parts of the estate including the disputed part of the Konganapuram Mitta. The deed so far as material to the present questions ran as follows :—

" As you have performed the funeral rites to my husband, the deceased Arthanari Gounden, and my son, the deceased Ramasami Gounden, as you have

P. C.

Rangasami Gounden v. Nachiappa Gounden.

Lord Dunedin.

the right to inherit as surviving heir all my properties after my death, as you have spent on my behalf and on behalf of my son your own (monies) and after borrowing monies required for conducting O. S. No. 5 of 1883 on the file of the District Court of Salem conducted by my son, the deceased Ramasami Gounden, as Plaintiff and all other civil and criminal proceedings in connection therewith in other Courts, as I am advanced in age and unable to supervise and manage the mitta and other lands and to collect the amounts due on the hypothecation debt bonds, and as you have consented to my possession and enjoyment with all rights and interests of all the properties other than those mentioned below which belong to me under the razinama decree in O.S. No. 5 of 1883 on the file of the District Court of Salem and which I am enjoying and of which I make a gift to you, and as you have promised to support me during my life-time at your expense and to have the marriage of my unmarried daughter performed according to our custom and to perform also *seeru* and *sirappu* for this and to another daughter who has been married, I have made a gift of the undermentioned properties valued at about Rs. 10,000 to you who is the elder brother's son of my husband, deceased Arthanari Gounden and delivered possession to you. Therefor you shall in comfort possess and enjoy the undermentioned properties from generation to generation and with powers to give away by gift, sale, etc. I have no manner of right or interest over the said gift properties."

Ramasami Gounden entered into possession but died prior to 1896, and was succeeded by his two nephews, the sons of his undivided brother. The nephews were Sandara, now deceased, and Arthanari, the first defendant.

In 1896 the nephews conveyed to the plaintiff by deed of sale two small properties which had been included in Marakammal's deed, and in the same year they borrowed from the plaintiff a sum of money, and in security therefor mortgaged four-fifteenths of Konganapuram Mitta on the recital that they held two-fifteenths in respect of their own succession, and two-fifteenths in respect of Marakammal's deed.

The learned District Judge gave judgment in favour of the plaintiff. The judgment being for one-half of all the property held by Marakammal included, *inter alia*, one-fifteenth of Konganapuram Mitta. This judgment was acquiesced in by all concerned except the present respondent and his father, who as before stated, subsequently died, so that the present respondent alone further proceeded with the litigation.

The grounds on which the suit was resisted were : (1) that the deed by Marakammal was valid and carried the property in question ; (2) that even if it did not, the plaintiff had either ratified the deed by reason of his taking the conveyances and mortgage above set forth, or was at least estopped from saying that the deed was bad.

P. C.

Rangasami Gounden v. Nachiappa Gounden.

Lord Dunedin.

Appeal being taken to the High Court, the case was heard by Miller, J., and Sadasiva Aiyar, J. Miller, J., agreed *in omnibus* with the District Judge. Sadasiva Aiyar, J., dissented from this view and considered that the deed by Marakammal was good, it being in his view, a correct proposition that "a partial alienation by a widow to the nearest reversioner is valid in law when he is a male, and gives him full ownership right in the alienated property."

The Judges thus differing in opinion, the appeal was dismissed. It was then again appealed under the Letters Patent to a Full Bench, and was heard by Wallis, C. J., and Seshagiri Aiyar and Kumaraswami Sastri, JJ. The learned Judges all agreed with Miller, J., and the District Judge as to the law applicable to the deed, but they held that the plaintiff was estopped from denying its validity in respect of the mortgage transaction. The suit was therefore dismissed as against the present respondent. Appeal was then taken to this Board.

The first matter to be considered is the *dictum* of Sadasiva Aiyar, J., that a partial alienation by a widow to the nearest reversioner is valid in law when he is a male, and gives him full ownership right in the alienated property. It is true that this did not find acceptance with any of the learned Judges of the Court of Appeal, but it is founded in the opinion of the learned Judge on the most recent judgment of the Privy Council, *viz.*, *Bajranji Singh* v. *Manokarnika Baksh Singh*, 1 and it is obvious that if it is sound it disposes at once of the case in favour of the respondent.

This raises the consideration of the whole subject of the power of a Hindu widow over estate which belonged to her husband to which she has succeeded, either immediately on the death of her husband, or as here on the death of her own childless son, her husband being already dead. This subject has been dealt with in many cases which are too numerous to cite individually; it has given rise to different current of judicial opinion, and, as in this case and some others, to actual difference in judical determination. The most recent examination of the subject in full in the Courts of India will be found in the case of *Debi Prosad Chowdhury* v. *Golap Bhagat*, 2 and their Lordships wish to acknowledge how much they have been assisted by the-

1. (1907) L. R. 35, I. A. 1. 2. (1913) I. L. R. 40, Cal. 721.

P. C.

Rangasami Gounden v. Nachiappa Gounden.

Lord Dunedin.

lucid and able judgments of Jenkins, C.J., and Mookerjee, J., in that case, which though expressed in terms which are not identical, are in substance the same.

It has often been noticed before, but it is worth while to repeat, that the rights of a Hindu widow in her late husband's estate are not aptly represented by any of the terms of English law applicable to what might seem analogous circumstances. Phrased in English law terms, her estate is neither a fee nor an estate for life, nor an estate tail. Accordingly one must not, in judging of the question, become entangled in western notions of what a holder of one or other of these estates might do. On the other hand, what a Hindu widow may do has often been authoritatively settled. Here arises that distinction which, as Seshagiri Aiyar, J., most justly observed in the present case, will if not kept clearly in view, inevitably lead to confusion—the distinction between the power of surrender or renunciation, which is the first head of the subject, and the power of alienation for certain specific purposes, which is the second.

To consider first the power of surrender. The foundation of the doctrine has been sought in certain texts of the Smritis. It is unnecessary to quote them. They will be found in th opinions of the learned Judges in some of the cases to be cited. But in any case it is settled by long practice and confirmed by decision that a Hindu widow can renounce in favour of the nearest reversioner if there be only one or of all the reversioners nearest in degree if more than one at the moment. That is to say, she can, so to speak, by voluntary act operate her own death. The landmark of decision as to this may be taken as the case of *Behari Lal* v. *Madho Lal Ahir Gyawal.* [1] where in delivering the judgment of the Board, Lord Morris said :

"It may be accepted that according to Hindu Law, the widow can accelerate the estate of the heir by conveying absolutely and destroying her life-estate. It was essentially necessary to withdraw her own life-estate so that the whole estate should get vested at once in the grantee."

That this was no new doctrine but was only the final sanction of a long series of decisions may be taken from the opinions of Garth, C.J., and Mitter, J., in the case of *Nobokishore* v. *Hari Nath Sarma Roy,* [2] which had been decided six years before *Behari Lal's* case.

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1. (1891) L. R. 19, I. A. 30 2. (1884) I. L. R. 10, Cal. 1102.

P. C.

Rangasami Gounden v. Nachiappa Gounden.

Lord Dunedin.

It has been suggested that the expressions in *Behari Lal's* case only meant that the widow should retain no interest in what was surrendered, and that therefore a partial surrender provided that the surrender was absolute as to that part was valid. This however is quite against the principle on which the whole transaction rests. As already pointed out it is the effacement of the widow—an effacement which in other circumstances is effected by actual death or by civil death—which opens the estate of the deceased husband to his next heirs at that date. Now there cannot be a widow who is partly effaced and partly not so, and consequently the suggestion was in their Lordship's view rightly rejected by the Calcutta Full Bench in *Debi Prosad Chowdhri* v. *Golap Bhagat*, already cited, and by the Full Bench in Madras in *Marudamuthu Nadan* v. *Srinivasa Pillai* [1], and by all the learned Judges in this case.

The surrender, once exercised in favour of the nearest reversioner or reversioners, the estate became his or theirs, and it was an obvious extension of the doctrine to hold that inasmuch as he or they were in title to convey to a third party, it came to the same thing if the conveyance was made by the widow with his or their consent. Thiswas decided to be possible by *Nobokishore's case* [2] already cited. The judgment went upon the princple of surrender, and it might do so for the surrender there was of the whole estate, but it is worthy of notice that the order of reference showed that the alienation was ostensibly on the ground of necessity, so that it might have been supported on the grounds to be mentioned under the second head above set forth.

Turning now to the second head, *viz.*, the power of alienation, which may be alienation to any one, whether an heir or not, there is again authority of long standing. As a leading case may be taken, *The Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* [3], in a passage which need not be quoted at length. The purposes for which alienation is legitimate may be summarised as religious or charitable purposes, and those which are supposed to conduce to the spiritual welfare of the husband, or necessity. Now, necessity must be proved, and the mere recital in the deed of alienation is not sufficient proof:

1. (1897) I. L. R. 21 Mad. 128. 2. (1884) I. L. R. 10 C. 1102. 3. (1861) 8 M. I. A. 529.

P. C.

Rangasami Gounden v. Nachiappa Gounden.

Lord Dunedin.

Banga Chandra Dhur Biswas v. *Jagat Kishore Chowdhuri*[1]. An equitable modification has also been admitted in the case where the alienee has in good faith made proper enquiry and been led to believe that there was a case of true necessity.

Thus far if the alienation stands alone. But it may be fortified by the consent of reversionary heirs. The remaining question is what is the effect of such consent. If the alienation be total and the reversionary heirs be the nearest it falls within the first division. But what if it be partial?

The matter is mooted in the case of *The Collector of Masulipatam* just mentioned. Their Lordships there say :—

"On the other hand it may be taken as established that an alienation by her which would not otherwise be legitimate may become so if made with the consent of the husband's kindred. The exception in favour of alienation with consent may be due to a presumption of law that when that consent is given, the purpose for which the alienation is made must be proper."

The opinion which is here only tentatively expressed, *viz.*, that consent does not give force *per se*, but is of evidential value, is corroborated by much subsequent authority. In the case of *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry*[2], Sir James Colvile says :—"There should be such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one and one justified by Hindoo Law." Lord Davey uses the same form of expression in *Sham Sunder Lal* v. *Achhan Kunwar*[3]. It was deliberately accepted in *Debi Prosad's case*, and was again affirmed by the Privy Council in *Bijoy Gopal Mukerji* v. *Girindra Nath Mukerji*[4], where it is said, that the consent of reversioners was looked on "as affording evidence that the alienation was under circumstances which rendered it lawful and valid."

But further, if the matter be considered on principle, it seems clear that this must be the true view. For, first, if mere consent, as such, of the reversioner could validate alienation, then the rule as to total surrender would be an idle rule. And secondly, mere consent, could only validate on the theory that the reversioner, together with the widow, represented the whole estate. But that is impossible unless the reversioner has a vested interest, whereas it is settled that he has only a *spes successionis*

1. (1916) L. R. 43, I. A. 249=31 M. L. J. 568. 2. (1869) 13 M. I. A. 209.
3. (1898) L. R. 25 I. A. 183.
4. (1914) I. L. R. 41 Cal. 793=27 M. L. J. 123.

P. C.

Rangasami Gounden v. Nachiappa Gounden.

Lord Dunedin.

The view that consent operates *proprio vigore* is, apart from casual expressions, really based on the authority of *Bajranji Singh's case.* It is therefore expedient to examine what was really there decided. The only real point at issue (apart from the question as to a particular custom of succession which is *nihil ad rem*), was whether the strict rule which had been laid down by the Allahabad High Court should be followed, or whether the extension permitted by the High Court of Calcutta was allowable. The Allahabad Court had laid down that where necessity was not proved *aliunde* then the consent of any number of reversioners would not bind a reversioner who possessed that character at the death of the widow, and who had not himself been one of the consenters. The Calcutta Court had decided that if the consent of the reversioners at the time being was of an adequate character then the eventual reversioner could not challenge the transaction.

The Judicial Committee examined the various cases which had been decided from the beginning. They set forth the cases of surrender and those of partial alienation without discriminating for the purposes of the case before them between the two principles. They did not in any way throw doubt on the former judgment in *Behari Lal's case*, which settled that a surrender must be total. Having set out the cases, the judgment, after quoting the opinion of Ranade, J., in *Vinayak* v *Govind* [1]: "The consent of the reversioners must be of such kindred the absence of whose opposition raises a presumption that the alienation was a fair and proper one," continues: "The principle being thus admitted by the High Courts in India the question of the *quantum* of consent necessary only remains." And then, as the consent in that case had been given by the whole of the reversioners then in existence, it decided that the Allahabad rule was too strict, and that the transaction must stand in a question with two reversioners who had not been parties to the transaction but were sons of those who had. The judgment affirmed the Calcutta as against the Allahabad rule, but it did not particularise on what exact ground the alienation was supported.

Now it is to be observed that in the particular case it might possibly have been supported on either ground. Although there were three successive alienations they, *in cumulo*, amounted to

1. (1900) I. L. R. 25 Bom. 129.

P. C.

Rangasami Gounden v. Nachiappa Gounden.

Lord Dunedin.

an alienation of the whole immoveable property, and it is just possible that the fact was overlooked which was noticed by the learned Chief Justice in this case, that the widow was also possessed of moveable property. But apart from that, the alienations were all made for purposes of ostensible necessity. Their Lordships have examined the record and find that two of the alienations were to meet money spent in litigation presumably connected with the estate, and the third to pay government duty. This would protect the alienation on the principles already stated. It is true that the concluding words of the judgment as to the sons being bound by the consent of the fathers "through whom they claim" could be read as indeed they have been read as indicating that consent operated *proprio vigore*. But two remarks fall to be made. First the idea of an eventual reversioner claiming through any one who went before him is opposed both to principle and authority. It is opposed to principle because, as already stated, there is no vested right till the death. It is opposed to authority : (*Bahadur Singh* v. *Mohar Singh*, [1]). Secondly, there is no hint in the judgment that their Lordships proposed to lay down a new doctrine which would render quite immaterial most of the cases quoted. It seems therefore much safer to conclude that the judgment was only meant to settle the point at issue, *viz.*, the comparative merits of the Allahabad and the Calcutta rules, leaving the operation of consent to stand on the perfectly logical grounds of the authorities quoted, than to hold that a new and illogical extension of the law was introduced, and to find consolation in the fact as stated by Sadasiva Aiyar, J., that Lord Halsbury once said that law was not a logical science.

The result of the consideration of the decided cases may be summarised thus : (1) An alienation by a widow of her deceased husband's estate held by her may be validated if it can be shown to be a surrender of her whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time of the alienation. In such circumstances the question of necessity does not fall to be considered. But the surrender must be a *bona fide* surrender, not a device to divide the estate with the reversioner. (2) When the alienation of the whole or part of the estate is to be supported on the ground of necessity, then if

1. (1901) L. R. 29 I. A, at p. 1.

P. C.
Rangasami Gounden v. Nachiappa Gounden.
Lord Dunedin

such necessity is not proved *aliunde* and the alienee does not prove enquiry on his part and honest belief in the necessity, the consent of such reversioners as might fairly be expected to be interested to dispute the transaction will be held to afford a presumptive proof which if not rebutted by contrary proof will validate the transaction as a right and proper one. These propositions are substantially the same as those laid down by Jenkins, C. J., and Mookerjee, J., in *Debi Prosad's case.* It follows that their Lordships cannot agree with a good deal of what was said in the case of *Rangappa Naik* v. *Kampti Naik* [1].

It now becomes necessary to fix what was the character of the deed executed by Marakammal in favour of Ramasami Gounden. All the Judges in the Courts below concurred in holding that it was not a total conveyance of Marakammal's property and that was scarcely contested by learned Counsel before this Board. This prevents it receiving effect as a surrender. Counsel however strenuously argued that it was a deed for consideration and not a deed of gift. As to this all the Judges have decided that it was a deed of gift except Kumaraswami Sastri, J., who says that in his view it is unnecessary to decide, but that if he had to do so he would hold it a deed for consideration. Their Lordships see no ground for disagreeing with the result arrived at by the large majority of the learned Judges below. It calls itself a deed of gift, and it is apparent from the opinion of the Chief Justice that this point was abandoned at the trial and is not mentioned in the reasons for appeal to the Appeal Court.

Being a deed of gift it cannot possibly be held to be evidence of alienation for value for purposes of necessity. It follows, therefore, that the deed, taken by itself, cannot stand.

So far the result at which their Lordships have arrived is in consonance with the views of all the learned Judges in the Courts below except, Sadasiva Aiyar, J. But the Judges who heard the Letters Patent Appeal differing from the District Judge and from Miller, J., have held that the appellant cannot be allowed to challenge the deed on the ground of estoppel or ratification in respect of his conduct in taking the mortgage as above set forth. Their Lordships are unable to agree in this view. They think with Miller, J., that there is here no room for the doctrine of estoppel. Of estoppel by record or by deed, obviously there is none. The

1. (1908) I L. R. 31 Mad, 366.

P. C.
Rangasami Gounden v Nachiappa Gounden
Lord Dunedin.

definition of, estoppel in the Indian Evidence Act—a definition which covers both estoppel by deed and *in pais*—is in S. 115. "When a person has by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act on such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representatives to deny the truth of that thing." How can it be said that the plaintiff, by any act of his, led the respondents to think that something was true and then to act on that belief? The learned Judges of the Appeal Court rest their opinion on *Bajranji Singh's case.* Their Lordships have already examined that case, and stated what in their view is the true import of the judgment. But apart from that, if *Bajranji Singh's case* had been decided on the ground of estoppel, it affords no parallel to the present case. In that case all the reversioners in being had consented to the alienations. They were bound by their own consent and the *post nati* were held to claim through those that were bound. Here the plaintiff never consented to the deed, nor is his claim traced through Ramaswami even in the matter of descent.

No doubt their is another view which is not estoppel, but is expressed by one learned Judge as ratification. It is scarcely that, though it might be hyper-criticism to object to the use of the word. What it is based on is this. An alienation by a widow is not a void contract, it is only voidable : (*Bijoy Gopal Mukherji* v. *Krishna Mahishi Debi*, [1]). Now in all cases of voidable contracts there is a general equitable doctrine common to all systems, that he who has the right to complain must do so when the right of action is properly open to him and he knows the facts. If, therefore, a reversioner, after he became *in titulo* to reduce the estate to possession and knew of the alienation, did something which showed that he treated the alienation as good, he would lose his right of complaint. This may be spoken of, though scarcely accurately, as ratification. In some cases it has been expressed as an election to hold the deed good ; (*Rajah Modhu Sudan Singh* v. *Rooke Singh* [2].

But it is well settled that though he who may be termed a presumptive reversionary heir has a title to challenge an alienation at its inception he need not do so, but is entitled to wait

1. (1907) I. L. R. 34 Cal. 329. 2. (1897) L. R. 24 I. A. 164.

P. C.

Rangasami Gounden v. Nachiappa Gounden.

Lord Dunedin.

till the death of the widow has affirmed his character, a character which up to that date might be defeated by birth or by adoption. The present plaintiff raised these proceedings immediately after his title was confirmed.

Of course something might be done even before that time which amounted to an actual election to hold the deed good. In that view what was done here? The learned Judges who heard the Letters Patent Appeal dismiss as inadequate the fact of the purchase of the two small pieces of ground. But they attach great weight to the taking of the mortgage. Here they have made a slip as to the facts. The mortgage did not consist, as they think, of only the share of the Mitta which had come through the deed of gift. It consisted also of two-fourteenths of the Mitta which had come to the mortgagors in right of their own succession. The value of this share was more than the sum secured by it. Now, at the time of the mortgage the plaintiff did not know whether he would ever be such a reversioner in fact as would give him a practical interest to quarrel with the deed of gift. Why should he not take all that the mortgagors could give or propose to give? To hold that by so doing he barred himself from asserting his own title to part of what was mortgaged seems to their Lordships a quite unwarrantable proposition.

Their Lordships will therefore humbly advise His Majesty to allow the appeal, and to restore the decree of the District Judge; the appellant to have his costs in the Courts below and before this Board.

Solicitors for Appellant :—*Barrow, Rogers and Nevill.*

Solicitor for Respondent :—*Douglas Grant.*

A. P. P.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Ammalu Achi v. Ponnammal Achi.

PRESENT :—MR. JUSTICE SESHAGIRI AIYAR, AND MR. JUSTICE NAPIER.

Ammalu Achi, by her authorised agent G. Venkatachalam Pillai ... *Appellant** (*Plaintiff*).

v.

Ponnammal Achi and others ... *Respondents.* (*Defendants*).

Election—Doctrine—Scope and applicability—Basis—Quantum of compensation if material on question of applicability of doctrine—What constitutes election.

A, who was managing the properties inherited by the daughter of his deceased brother, died leaving a will whereby he bequeathed a portion of those properties to

* S. A. No. 1425 of 1916. 11th October, 1918.

Ammalu Achi
v.
Ponnammal
Achi.

B and a sum of Rs. 800 to his neice. In a suit brought by the neice to recover the properties inherited by her and bequeathed to *B* and also the legacy of Rs. 800, *held* that the doctrine of election applied to the case notwithstanding that the neice would get an absolute right in the sum bequeathed to her while *B* would take only her life-interest in the properties bequeathed to him.

Held, further, that the fact that the neice took possession of the immoveable properties in execution of the decree therefor in her favour did not constitute an election when in the appeal against the decree she claimed the money in addition.

Scope of the doctrine of election considered.

Second Appeal against the decree of the District Court of Tanjore in Appeal Suit No. 253 of 1915, preferred against the decree of the Court of the Temporary Subordinate Judge of Tanjore in Original Suit No. 45 of 1913.

T. R. Ramachandra Aiyar and *A. V. Visvanatha Sastri,* for Appellant.

T. R. Venkatarama Sastri and *S. Subramania Ayar,* for Respondents.

The Court delivered the following

Judgment :—Before we dispose of this Second Appeal finally, there must be a finding on the following question :—

Whether Subramania Thevan intended the 800 rupees which he referred to in his will as a debt due to the plaintiff to represent the value of the 3 acres of ancestral land belonging to the plaintiff which he devised to others and other rights, if any, which the plaintiff had against him in respect of his management of her property.

No fresh evidence will be adduced. The findings should be submitted in six weeks and seven days will be allowed for filing objections.

[In compliance with the order contained in the above judgment, the District Judge of Tanjore submitted the following finding.

I therefore find in answer to the reference that there is no reason to believe that Subramania Thevan intended the Rs. 800 to represent the value of 2·59 acres belonging to the plaintiff and devised by him, or the value of any other claims which the plaintiff may have had on him. I find that in all probability he had no such intention and that the Rs 800 was a separate legacy bequeathed to the plaintiff which is not referable to any antecedent claim which the plaintiff had on him. I return a finding accordingly.]

Ammalu Achi v. Ponnammal Achi.

This Second Appeal coming on for final hearing.

The Court delivered the following

Judgment :—The finding is that the testator intended to make an independent gift of Rs. 800 to the plaintiff by his will. The testator was the divided brother of the plaintiff's father; and managed, the properties which she inherited, during her minority. Before his death, the testator bequeathed a portion of the properties which he was then managing to the 2nd defendant; by the same instruments he gave the plaintiff Rs .800. She now sues to recover the devised inherited property and also the legacy of Rs. 800. The 8th issue in the case raises the question of election. In our opinion, the doctrine is applicable to the present case. The weight of authority in England is to regard the doctrine as based on the principle of compensation and not on that of forfeiture. See *Ker* v. *Wauchope*. [1] and *Rancliffe (Lord)* v. *Parkyns* [2]. The fact that the 2nd defendant may be compelled at the instance of the reversioners to give up the property after the life-time of the plaintiff, whereas she will have an absolute right in the Rs. 800 bequeathed to her is not a ground for not applying the doctrine of election. The *quantum* of compensation is not what the Court looks to. It is only concerned with seeing that a party deprived of a right vesting in him is recompensed by the gift of another property, whatever may be its nature or duration of enjoyment. See *Wilson* v. *Lord John Townshend* [3], and *Webb* v. *Shaftesbury (Earl of)* [4]. Further as pointed out in *Whistler* v. *Webster* [5] "it is immaterial" in regard to the doctrine of election whether the testator, in disposing of that which is not his own, is aware of his want of title, or proceeds on the erroneous supposition that he is exercising a power of disposition which belongs to him; in either case, whoever claims in opposition to the will, must relinquish what the will gives him" (Jarman on Wills, First Edition 387). See also *Thellusson* v. *Woodford* [6] and *In re Brooksbank : Beauclerk* v. *James* [7]. The fact therefore that had the testator known that he was giving the 2nd defendant only a precarious life-interest in the 2 acres, he may not have given plaintiff Rs. 800, is not a sufficient reason for not giving the

1. (1819) 1 Bligh, H. L. 1=4 L.R. 1.
2. (1818) 6 Dow. 149.
3. (1795) 2 Vesey (Junior) 693.
4. (1802) 7 Vesey 480=32 L.R. 1911
5. (1794) 2 Ves. 370.
6. (1806) 13 Vesey, 209, 221.
7. (1886) 34 Ch Dvn. 160.

Ammalu Achi v. Ponnammal Achi.

plaintiff the Rs. 800 if she chooses to claim it. The principle on which election rests has been thus stated by Jarman at page 532. "The doctrine of election may be thus stated. That he who accepts a benefit under a deed or will, must adopt the whole contents of the instrument conforming to all its provisions and renouncing every right inconsistent with it. If, therefore, a testator has affected to dispose of property which is not his own, and has given a benefit to the person to whom that property belongs, the devisee or legatee accepting the benefit so given to him must make good the testator's attempted disposition: but, if, on the contrary, he chooses to enforce his proprietary rights against the testator's disposition, equity will sequester the property given to him, for the purpose of making satisfaction out of it to the person whom he has disappointed by the assertion of those rights." This statement has been accepted as a correct exposition of the rule by eminent Judges. See also *Cooper* v. *Cooper* [1] and *Codrington* v. *Codrington* [2].

Mr. Ramachandra Aiyar relying on *In re Lord Chesham*: *Cavendish* v. *Dacre*, [3] contended that as the plaintiff had no power of dispossession over the property dealt with by the testator no question of election can arise. The plaintiff could certainly alienate her life-interest even granting that was all that she had in the 2 acres disposed of by the testator. The decision in *Mahammad Afzal Khan* v. *Ghulam Kasim Khan* [4] proceeded on the footing that as the party was asked to choose between two donations by two different donors, no question of election arose. We may say that S. 35 of the Transfer of Property Act and S. 172 of the Indian Succession Act enunciate the doctrine of election as enforced in England: but as those sections do not apply to Hindus, we have preferred to base our judgment on English decisions. We are unable to agree with Mr. T. R. Venkatarama Sastri that the plaintiff had deliberately made her choice because she took possession of the immoveable properties decreed to her pending the appeal. In the appeal she claimed the money in addition. Therefore the immoveable property as well as the money were in dispute in the appeal. We think that in modification of the decree of the Lower Appellate Court, plaintiff should be given 2 months' time to elect which of the two properties she would accept. If she does not elect within

1. (1874), L. R. 7 H.L. 53.
2. (1875) L. R. 7 H. L. 854.
3. (1886) 31 Ch. Dvn. 466.
4. (1903) I. L. R. 30 Cal. 843 (P.C.)

that time, it must be held she elected to retain the immoveable properties which she took possession of in execution. The respondent will then be at liberty to apply for restitution of the other property, if that contingency arises. The order as to costs in the Lower Courts will stand. In this Court each party will bear her or their own costs.

A. S. V.

PRIVY COUNCIL.

PRESENT :—LORD SHAW, LORD PHILLIMORE, SIR JOHN EDGE AND MR. AMEER ALI.

[On appeal from the High Court of Judicature at Bombay.]

Pratapsing Shivsing and another ... *Appellants**

v.

Thakor Shri Agarsinghji Raisinghji ... *Respondents*

Hindu Law—Adoption—Widow's power of adoption—Not dependent on her inheriting husband's estate—Adopted son, his rights—Devesting of estate by adoption—Jivai grants—Zemindar's reversion on failure of male heir—May be devested by adoption.

The right of a Hindu widow to make an adoption to her deceased husband is not dependent on her inheriting his estate. She can exercise the power, so long as it is not exhausted or extinguished, even though the property was not vested in her.

It is an explicit principle of Hindu law that an adopted son becomes, for all purposes, the son of his father, and that his rights unless curtailed by express texts, are in every respect the same as those of a natural born son.

Semble, that the only express text contracting the heritable rights of an adopted son refers to the case of his sharing the heritage with an after born natural (aurasa) son.

Hindu lawyers do not regard the male line to be extinct or a Hindu to have died without male issue until the death of the widow renders the continuation of the line by adoption impossible.

By the custom of a family in the Ahmedabad District jivai or maintenance grants were made out of the impartible family estate to younger sons, with reversion to the estate upon failure of male heirs, widows not inheriting In October 1903 the last holder of such a grant died without male issue, but leaving a widow. In March 1904 she adopted a son to him.

Held, that the son inherited the jivai grant.

Appeal from a decree of the Bombay High Court dated April 9, 1911, reversing a decree of the Subordinate Judge of Ahmedabad.

The respondent, the Thakur of Gamph, sued for possession of a jivai grant made by his ancestor on the ground that the last holder having died without male issue, the grant by custom reverted to the grantor. He denied the validity of appellant's adoption subsequent to the last holder's death.

* 8, 9, 11, 12 and 15th July, 1918. P. C. Appeal No. 110 of 1917.

P. C.

Pratapsing Shivsing v. Thakor Shri Agarsinghji Raisinghji

The Subordinate Judge found the right of reversion proved. He held that defendant-appellant was validly adopted, but that his adoption did not affect plaintiff's right to resume. On the ground however that plaintiff's father by documents executed in 1871 had acknowledged the absolute right of the last holder, he held that plaintiff was estopped from questioning appellant's title and therefore dismissed the suit.

On appeal the Bombay High Court (Scott, C. J. and Batchelor, J.) differed from the Subordinate Judge as to the effect of the documents of 1871, and held that even if his view as to the effect of those documents were correct, they were inoperative by virtue of the Ahmedabad Taluqdars' Act (Bombay Act VI of 1862, S. 12). They agreed with the subordinate Judge that appellant was validly adopted, but held that as his adoption was subsequent to the death of the last holder, and the jivai grant at that date vested in plaintiff, the plaintiff's rights could not be affected by it. They accordingly decreed plaintiff's suit.

Hence this appeal.

De Gruyther, K. C. and *E. B. Raikes* for appellants: The documents of 1871 conferred an absolute estate on Kaliansingh, the last holder. The words used "maliks, mukhtiyars and dhanis" are all words as to which it has been held they are intended to confer an absolute estate. *Fateh Chand* v. *Rup Narayan* [1], *Surajmani* v. *Rabi Nath Ojha* [2], *Harihar Baksh* v. *Uman Pershad* [3] and *Ram Lal Mookerjee* v. *Secretary of State for India.* [4]

The first appellant succeeded to Kaliansingh's absolute estate, subject only to the mortgage by Kaliansingh in favour of the second appellant. The compromise of 1871 was not an "alienation" within the meaning of S. 12 of Bombay Act VI of 1862: a compromise is not a conveyance from one to another, it is only the recognition of a pre-existing right. *Khunni Lal* v. *Gobind Krishna Narain* [5]

(*Lord Phillimore*: Whoever heard of a man who was prevented from conveying an estate by saying "I admit"?)

Our case is there was a reference to arbitration, and these documents came into existence in pursuance of the arbitration decision. Further, a right to a reversion is not a landed estate within S. 12 which we submit applies only to the alienation of a landed estate of which the Collector has taken possession.

(*Lord Phillimore*: It does not prevent a personal action against the taluqdar.)

1. (1916) L. R. 43 I. A. 183; I. L. R. 38 A. 446.
2. (1907) L. R. 35 I. A. 17: 18 M. L. J. 7.
3. (1886) L. R. 14 I. A. 7.
4. (1881) L. R. 8 I. A. 46, 61.
5. (1911) L. R. 38 I. A. 87: I. L. R. 33 A. 356=21 M. L. J. 645.

Assuming however that the land was held merely under the original jivai grant, plaintiff has not made out his case. The alleged custom of reversion is not satisfactorily proved by evidence relating to this particular family, nor is any custom proved excluding either widows or adopted sons.

Evidence as to custom in other families is inadmissible. *Ram Nandan Singh* v. *Janki Koer* [1]. (Reference was made to J. S. Peile's Taluqdars in Ahmedabad Zillah, 1867—Select Records, Bombay Government).

In Hindu law an adopted son occupies the same position as a natural born son. *Nagindas Bhugwandas* v. *Bachoo Harikisondas.* [2] In *Rameshvar Singh* v. *Jibendar Singh* [3] a case of a babuana grant, the learned Judges of the Calcutta High Court observed that the contingent or reversionary interest of the grantor was "remote in a country where the line of male descendants can be re-inforced by the practice of adoption" a dictum not questioned when that case went to the Privy Council. *Durgadut Singh* v. *Rameshwar Singh.* [4] *Amarsangji Gulubsangji* v. *Dipsangji Jodsanghji* [5] was wrongly decided: moreover it refers to a different family.

Even though the widow do not inherit herself, the adoption by her devests any estate which would have been devested by a posthumous son: *Raghunada* v. *Braja Kishore* [6], *Madana Mohana Deo* v. *Purushottama Deo* [7], *Bachoo Harkisondas* v. *Mankorebai* [8], *Mayne's Hindu Law*, paras. 185, 191 (pp. 242, 250, 8th Edn.)

It is not a question of co-parcenary interest only being devested, for the first two of these cases related to impartible estates, and it is the essence of an impartible estate that there is no co-parcenary. *Rama Rao* v. *Raja of Pittapur.* [9]

The rule that an estate is devested by adoption applies in Bengal. *Surendra Nandan* v. *Sailaja Kant Das Mahapatra.* [10]

It is doubtful if a custom excluding an adopted son from inheritance would be valid, but anyhow it would have to be very strictly proved.

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1. (1902) L.R. 29 I. A. 178, 194, 195.
2. (1915) L. R. 43 I.A. 56=I.L R 40 B. 270=30 M.L J. 193.
3. (1905) I.L.R. 32 Cal. 683.
4. (1909) L. R. 36 I A. 176=I.L.R. 36 C. 943=19 M.L.J 567.
5. (1898) P. J (Bombay) 60.
6. (1876) L.R 3 I. A. 154=1 Mad. 69.
7. (1918) L.R. 45 I. A. 156=I.L.R. M41. 855=35 M L.J. 188.
8. (1907) L R. 34 I. A. 107=17 M.L J 343=31 Bom. 373.
9. (1918) 45 I. A. 148=I. L. R. 41 M. 778=35 M.L.J. 392.
10. (1891) I.L.R. 18 Cal 385.

P. C.

Pratapsing Shivsing v. Thakor Shri Agarsinghji Raisinghji.

The respondents tried to prove a custom prohibiting adoptions altogether among the Chudasama Girassias, to which the parties belonged, but this attempt failed, as a similar attempt failed in *Verabhai Ajubhai* v. *Bai Hirabai.* [1]

[Their Lordships intimated that they desired to hear counsel for respondent only on the evidence as to custom and the validity and effect of the adoption].

Dunne, K. C. and *Kenworthy Brown* for respondent; Both Courts have found that the custom in this family is as stated in the plaint, *viz*; that a jivai grant reverts to the taluqa upon failure of male descendants of the grantor. Those concurrent findings necessarily exclude (1) the last holder's widow (2) a son adopted after his death.

On the jivaidar dying without male descendants the jivai estate was extinguished.

In the absence of proof of a special custom the widow cannot revive the estate by an adoption. *Amarsangji Gulabsangji* v. *Dipsangji Jodsangji.* [2]

That case related to this very caste and was on all fours with the present one. The cases as to devesting of an estate do not apyly: there is no estate to be devested: it has come to an end. The rights of an adopted son date from his adoption, only they do not relate back, as though he were a posthumous son; *Bamandas Mookerjee* v. *Tarini,* [3] *Moro Narayan Joshi* v. *Balaji Ragunath,* [4] *Bhubaneshvari Debi* v. *Nil Komal Lahiri,* [5] Mayne's Hindu Law para. 197 (8th Edn. p. 261). In *Raghunada* v. *Braja Kishore* [6] the impartible property was regarded throughout as joint. In *Madana Mohana Deo* v. *Purushottama Deo* [7] the judgment expressly states the family was joint. These cases therefore do not help appellants.

The adoption itself was invalid. The power of a Hindu widow in Bombay to adopt without express authority is subject to the qualification that her husband's property must be vested in her as heir. *Ramji* v. *Gaman.* [8] *Dinkar Sitaram Prabhu* v. *Ganesh Shibaram Prabhu.* [9] Mayne's Hindu Law, para. 130 (8th Edn. p. 164).

In this case the jivai grant did not vest in thewidow. Further, the evidence is that the custom of this caste does not permit adoptions. Evidence of custom in other families of the same group is admissible:

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1 (1903) L.R. 30 I. A. 234.
2. (1898) P. J. (Bombay) 60.
3. (1858) 7 Moo. I. A. 169.
4. (1894) I.L.R. 19 Bom. 809.
5. (1885) L.R. 12 I A 137.
6. (1876) L.R. 3 I.A. 154=1 Mad 69
7. (1918) L.R. 45 I.A. 156.
8. (1879) I.L.R. 6 Bom. 498.
9. (1879) I.L.R. 6 Bom. 505.

P. C.

Pratapsing Shivsing v. Thakor Shri Agarsinghji Raisinghji.

Mr. Ameer Ali

Mohesh Chunder Dhal v. *Satrughan Dhal*[1] (Reference was also made to *Ekradeshvar Singh* v. *Janeshvari Babuasin*)[2].

Ther Lordships' judgment was delivered (December 13, 1918) by

Mr. Ameer Ali.—This is an action in ejectment brought by the Thakur of Gamph in the Court of the Subordinate Judge of the Ahmedabad District for possession of a village called Piparia. His suit is based on the ground that the village in question forms part of the estate of Gamph, that many years ago it was granted for maintenance or *jivai* by one of his ancestors to a junior member of the family to be held and enjoyed so long as the grantee's male line lasted, and that on the death of the last holder named Kalian Sing in 1903 without male issue, it reverted to him as the owner of the original estate under the custom attached to such *jivai* grants.

The action was brought on the 15th July, 1907, against Bai Devla, the widow of Kalian Sing, who was admittedly in possession of the village claiming to hold the same for her minor adopted son, who was also joined as defendant No. 2, whom she alleged she had taken in adoption shortly after the death of her husband. Devla has since died and the adopted son is the present appellant before this Board. The third defendant is a mortgagee claiming under a bond executed by Kalian Sing.

Both the plaintiff and the defendant Shivsing are Chudasama Girassias, a caste of Hindu Rajputs who, it is said, settled several generations ago in the Dhanduka Taluka appertaining to the Ahmedabad District. The Thakur of Gamph appears to have been one of their principal chiefs, and possessed at one time a considerable number of villages which, by successive grants to junior members of the family, have dwindled now to eight or nine, and the Thakur is naturally anxious to get back as many of these grants as possible.

The plaintiff states in his plaint that the grant in question in this case was made by one Milaji, his ancestor in the fifth degree, in favour of his third son Rupsingi, that on the death of Rupsingi it came into the possession of his two sons Kesarising and Kaliansing ; that subsequently on Kesarising's death without issue, the entire village came into the hands of

1. (1902) L. R. 29 I. A. 62.
2. (1914) L. R 41 I. A. 275=I L. R. 42 C. 582=27 M. L. J. 373.

P. C.

Pratapsing Shivsing v. Thakor Shri Agarsinghji Raisinghji.

Mr. Ameer Ali

Kaliansing who held it until his death in 1903; that Kalian also died without leaving any male issue, and that accordingly the village reverted to the grantor's estate, but the defendants were holding the property wrongfully and illegally without any title. The relief sought was of a two-fold character, *viz.* (1) a decree for possession and (2) for a declaration that the second defendant's adoption was "void and illegal."

The widow and the adopted son, Shivsing, denied the right of reversion claimed by the plaintiff; they alleged that in 1871 there were disputes between the plaintiff's father and Kaliansing regarding his title to Piparia, which were settled by arbitration, and documents were exchanged between the parties by which the plaintiff's father acknowledged the absolute title of Kaliansing to the village in question excepting a small area which was taken by the plaintiff's father as consideration for the settlement. They also alleged that there was no failure of Kaliansing's male line as the second defendant had been validly adopted. To this the plaintiff demurred and alleged on his side a custom among the Chudasama Girassias which precluded the widow from making an adoption to her deceased husband or inheriting a *jivai* grant. This latter allegation was evidently put forward in order to strengthen the first for it seems to have been thought that she could not make an adoption unless she could vest the adopted son with any rights to property owned by the deceased in his life-time, the idea apparently being that the son's right was dependent on the widow's right to inheritance.

Upon these allegations a number of issues were framed by the Trial Judge, but, as usually happens in India, the case was overladen with a variety of considerations which had only an indirect bearing on the main questions for determination. The Subordinate Judge held that, although there was no definite evidence from examples within the Taluka of Gamph regarding the custom relating to the right of reversion, judging, however, from cases in neighbouring estates, the plaintiff had succeeded in establishing it. He further held that the plaintiff had failed to establish the custom debarring the widow of a *jivaidár* from inheriting his estate or from making an adoption to him. But, throwing the onus on the defendant, he also held that although

P. C.

Pratapsing Shivsing *v.* Thakor Shri Agarsinghji Raisinghji

Mr. Ameer Ali.

the defendant was validly adopted he had not shown that his adoption affected the plaintiff's right to resume the *Jivai*. And he went on to hold that the documents executed in the proceedings of 1871 amounted to an acknowledgment on the part of the plaintiff's father of an absolute title and interest in Kalian Singh in the village of Piparia which descended to the defendant No.2, and that the plaintiff was estopped from questioning his title. Proceeding on these grounds the learned Judge dismissed the plaintiff's claim.

On the plaintiff's appeal from this decree the learned Judges of the Bombay High Court have affirmed the finding of the first Court with regard to the factum and, as their Lordships understand the judgment of the High Court, the validity of Shivsing's adoption; they agreed with the Trial Judge as to the existence of a right of reversion in the owner of the *Taluka* in respect of the *Jivai* on the death of the last *Jivaidar* without male issue. But they disagreed with him on the construction of the documents of 1871 ; they considered that the words on which the subordinate judge rested his judgment that the plaintiff's father acknowledged an absolute title in Kalian Singh did not bear that meaning ; and that even if those words did have tha meaning, the agreement entered into would amount to an "alienation," and as the estate of Gamph was at the time in charge of the Talukdari Settlement officer the transaction was inoperative under the provisions of S. 12 of Bombay Act VI 1862. Finally, they considered that although the first defendant was validly adopted and was entitled to succeed to other property left by his adoptive father, yet as his adoption took place after the reversion had taken effect and after Piparia had vested in the plaintiff which occured immediately Kalian Singh died, the plaintiff became entitled to possession of this *Jivai* village free of any burden created by the *Jivaidar*. They accordingly reversed the order of the Subordinate Judge and decreed the plaintiff's claim.

The present appeal to His Majesty in Council is by the defendants, and the points in issue have been elaborately argued on both sides. Their Lordships are disposed to agree with the Subordinate Judge with regard to the intent and meaning of the documents of 1871, but in the view they take of the principal question involved in the case, they do not consider it necessary

P. C.

Pratapsing Shivsing v. Thakor Shri Agarsinghji Raisinghji.

Mr. Ameer Ali.

to decide whether the transaction evidenced by those documents amounted to an "alienation" within the meaning of S. 12, Bombay Act VI of 1862, and was consequently invalid. They wish to deal with the case on the assumption that the nature of the grant and the status of the *Jivaidar* remained unchanged since the grant, and that what took place in 1871 did not enlarge his rights They also accept the conclusion at which the courts in India arrived regarding the existence of a right of reversion in the holder of the Gamph estate.

Now it is to be observed that when a hereditary grant of the nature in dispute is made by a Hindu subject to the limitation that it shall be descendible in the direct male line, or, in other words, that it shall enure so long as the grantees' male line lasts, the existence of the line must be determined by the rules and provisions of the Hindu law, unless there be any custom varying those rules. The limitation itself is a variation of the Hindu law; where a further custom is alleged confining the line to natural-born issue alone, it must be proved affirmatively and conclusively, and not derived from implications. The plaintiff in order to prove this further limitation, put forward a custom among the Chudasama Girassias prohibiting widows from making an adption—a custom wholly at variance with the Hindu law and Hindu religious conceptions. It is not necessary to determine in this case whether such a custom, even if proved to exist in certain localities would be recognised in the British Indian Courts. But here the plaintiff has entirely failed to establish the custom alleged by him. In the case of *Verabhai Ajubhai* v. *Bai Hiraba*, [1] which also arose among the Chudasama Girassias, the same custom was put forward with the same result. Both the Courts in India have in this case found that the second defendant was duly taken in adoption by Devla Bai. With that conclusion their Lordships concur. Their Lordships also hold that she had the power to make the adoption, and that Shivsing has the status of a validly adopted son.

Now it is an explicit principle of the Hindu law that an adopted son becomes for all purposes, the son of his father, and that his rights unless curtailed by express texts are in every respect the same as those of a natural-born son. And a learned

1. (1903) L. R. 30 I. A. 234.

P. C.

Pratapsing Shivsing v. Thakor Shri Agaringhji Raisinghji.

Mr. Ameer Ali.

authority on Hindu Law has explained that the only express text by which the heritable rights of an adopted son are "contracted" refers to the case of his sharing the heritage with an after-born natural *(aurasa)* son. "In every other instance the adopted son and the son of the body stand exactly in the same position" [1]. Again, it is to be remembered that an adopted son is the continuator of his adoptive father's line exactly as an *aurasa* son, and that an adoption, so far as the continuity of the line is concerned, has a retrospective effect: whenever the adoption may be made there is no *hiatus* in the continuity of the line. In fact, as Messrs. West and Buhler point out in their learned treatise on Hindu Law, the Hindu lawyers do not regard the male line to be extinct or a Hindu to have died without male issue until the death of the widow renders the continuation of the line by adoption impossible [2]. Much reliance has been placed on behalf of the respondent on the case of *Bamundoss Mookerjee* v. *Mussumat Tarini* [3]. The only point decided in that case was that a mere power given to a widow to adopt does not preclude her from maintaining an action in her own name and in her own right in respect of the property in her possession as her husband's widow. But it was also pointed out that there was no power under the Hindu Law to compel a widow to adopt. Unless there is a time limit imposed in the authority which empowers her to adopt, or she is directed to adopt promptly, she may make the adoption so long as the power is not extinguished or exhausted. The circumstance under which her power becomes extinguished is clearly pointed out by their lordships in *Bhoobun Moyee's* case [4], and in the judgment of this Board delivered by Lord Haldane in *Madana Mohana Deo* v. *Purushothama Deo* [5].

The right of the widow to make an adoption is not dependent on her inheriting, as a Hindu female owner, her husband's estate. She can exercise the power, so long as it is not exhausted or extinguished, even though the property was not vested in her. In *Raghunadha* v. *Brozo Kishoro* [6] on the death of an elder brother in an undivided family the estate, which was impartible, had devolved on the younger brother.

1. Rajcomar Sarbadhikary's "Lectures on Hindu Law." p. 557.
2. West and Buhler's Hindu Law, Third Edn. p. 996 Note (A).
3. (1858) 7 Moo. I. A. 169.
4. (1865) 10 Moo I A., p. 279.
5. (1918) L R. 45 I. A. 156 : 35 M. L. J. 138.
6. (1876) L. R. 3 I. A. p. 154: 1 Mad. 69.

P. C.

Pratapsing Shivsing v. Thakor Shri Agaringhji Raisinghji.

Mr. Ameer Ali.

Two years after the death of her husband the widow of the elder brother adopted a son to him. And this Board held that the adoption had the effect of defeating the right of the younger brother to the estate, and that the adopted son was entitled to possession. The rule enunciated in *Raghunadha's* case was followed in *Bachoo Harkisondas* v. *Mankorebai* [1]. In this case two brothers, Harkisondas and Bhagwandas, were members of a joint undivided Hindu family. Harkisondas died on the 14th September, 1900, leaving his widow pregnant. On the 30th November following Bhagwandas made a will authorising his widow to adopt a son to him. Bhagwandas died on the 17th December, 1900. Harkisondas' widow gave birth to a son Bachoo next day, and in the then state of the family Harkisondas's son became entitled to the entire family property. On the 17th February, 1901, Bhagwandas's widow adopted Nagar Dass. This Board affirmed the right of the adopted son to the share of his father, holding that the case was governed by the principle laid down in *Raghunadha's* case. Their Lordships consider that the rule enunciated in these two cases supplies the governing principle for the determination of the present case. It was contended with considerable force and some degree of plausibility that in the case of a *jivai* grant on the death of the holder thereof there is no property left for the adopted son to take, as it reverts to the grantor's estate immediately the *jivaidar* dies. But it was admitted that a posthumous son would prevent the reversion. If the widow happened to be *enceinte* the reversion naturally would remain in suspense until the birth of the child, to see whether it was a male or a female. It is futile, therefore, to say that the property reverts to the grantor's estate immediately the breath leaves the body of the *jivaidar*. Here the adoption was made within the period of natural gestation, and the property was at the time of the adoption in the possession of the widow and still is in the possession of the adopted son. It may be that if a Hindu widow lies by for a considerable time and makes no adoption, and the property comes into the possession of some one who would take it in the absence of a son, natural or adopted, and such person were to create rights in such property within his competency whilst in possession, in such a case totally

1. (1907) L. R. 34 I. A. 107.

P. C.

Pratapsing Shivsing v. Thakor Shri Agaringhji Raisinghji.

Mr. Ameer Ali.

different considerations would arise. But here there is nothing of the kind to modify the true application of the Hindu Law.

Their Lordships are of opinion that this appeal should be allowed, the decree of the High Court of Bombay should be reversed, and the suit of the plaintiff dismissed with costs in all the courts, including the costs of this appeal.

And their Lordships will humbly advise His Majesty accordingly.

Solicitors for Appellants :—*Ranken Ford and Chester.*

Solicitors for Respondent :—*Hickson, Moir and Jeakes.*

A. P. P.

PRIVY COUNCIL.

PRESENT :—VISCOUNT HALDANE, LORD PHILLIMORE, SIR JOHN EDGE, AND MR. AMEER ALI.

[On appeal from the High Court of Judicature for the North-Western Provinces, Allahabad.]

Nawab Nazir Begam ... *Plaintiff—Appellant.* *

v.

Rao Raghunath Singh and others ... *Defendants—Respondents.*

P. C.

Nawab Nazir Begam v. Rao Raghunath Singh.

Hindu Law—Mitakshara—Joint family—Money borrowed by manager of joint family at high rate of interest—Legal necessity—Necessity for exceptional terms—Burden of proof—

It is incumbent on those who support a mortgage made by the manager of a joint Hindu family to show not only that there was necessity to borrow, but that it was not unreasonable to borrow at some such high rate and upon some such terms, and if this be not shown the rate and terms cannot stand even though the charge be upheld.

All terms of the mortgage in excess of necessity are outside the scope of the manager's authority.

Appeal from a decree of the Allahabad High Court, dated April 23, 1913, varying a decree of the Subordinate Judge of Agra.

The facts sufficiently appear from the Board's judgment. The Subordinate Judge allowed the plaintiff's claim in full, without going into the question whether it was necessary that the loan should have been contracted on the onerous terms of the deed sued on. On appeal the learned Judges of the Allahabad High Court (Banerji and Ryves) reduced the interest allowed to 12 per cent. simple interest, and ordered

* P. C. Appeal No. 80 of 1916 24th January 1919.

P. C.

Nawab Nasir v. Rao Raghunath Singh.

that the parties should pay and receive costs in both Courts in proportion to failure and success. On the question of the amount of interest their judgment was as follows:—

"The next question is whether there was any necessity for charging the family property for a loan taken on such onerous terms as the terms of this loan. The rate of interest, as we have stated above, was Rs. 2-8-0 per cent per mensem, *i.e.*, 30 per cent per annum, compound interest with half-yearly rests. It was also agreed that after the expiry of one year the interest would be raised to Rs. 3-2-0 per cent per mensem, *i.e.*, Rs. 37-8-0 per cent per annum compound interest. According to the ruling of the majority of the Full Bench in the case of *Chanderdeo Singh* v. *Mata Prasad* [1], the burden lay on the plaintiff to prove the existence of a valid family necessity, and in the later case of *Nand Ram* v. *Bhopal Singh* [2], it was held that it was also the duty of the plaintiff mortgagee to prove that there was necessity for raising the loan at the high rate of interest agreed on by the manager of the family. There can be no doubt that the rate of interest in the present case was enormously high, so much so that the allegation is that the debt of Rs. 398 has now swelled to 3 or 3½ lakhs. There is not a particle of evidence to prove that there was any necessity for borrowing money at such an exorbitant rate of interest. The security given for the small loan of Rs. 398 was amply sufficient, four villages being mortgaged for the loan. Therefore, on the face of the transaction it is clear that there was no necessity for borrowing money at such a high rate of interest. No evidence has been given on the point on behalf of the plaintiff and it has not been shown that Ram Narain Singh could not raise a loan of Rs. 398 at a lower rate of interest. As it has not been proved that there was any necessity for raising the loan at such a high rate of interest, the family property cannot be held liable for interest at this exorbitant rate. We have a discretion in the matter and we think we should be justified in reducing the rate of interest to a reasonable figure. In view of the security given to the mortgagee and also of the fact that unusually long delay has been made in bringing the suit, we think that simple interest at the rate of 12 per cent per annum would be amply sufficient to compensate the mortgagee or his representative for the interest which he should get on the principal amount of the loan. In this respect we think that the decree of the court below is erroneous."

Plaintiff appealed.

Sir W. Garth, for appellant, submitted that no case had been made out in the trial Court that there was no necessity

1. (1909) I. L. R. 31 All. 176. 2. (1911) I. L. R. 34 All. 126

P. C.

Nawab Nazir v Rao Raghunath Singh.

for the rate of interest. In that Court the only defence was that the transaction was brought about by undue influence and was unconscionable: it was a defence under S. 16 of the Indian Contract Act. That defence had failed. The trial Judge did not determine the question whether or not the loan could have been raised at a lower rate of interest: no issue was raised on that point, and hence no evidence was or could be given. The parties, it was found, contracted freely, and this being so the High Court had no discretion to reduce the the rate agreed upon. (Reference was made to *Nand Ram* v. *Bhupal Singh* [1] and *Rajah Hurronath Roy Bahadur* v. *Rundir Singh* [2]. In any case, plaintiff should have been given a decree against respondents Nos. 13 to 15 for the difference between the amount decreed upon the mortgage and Rs. 6,500.

Dube, for respondents, was not called on.

Their Lordships' judgment was delivered (February, 18, 1919) by

Lord Phillimore.

Lord Phillimore:—This suit was brought to enforce a mortgage made on the 7th November, 1884, by the ancestor of the defendants and respondents Nos. 1 to 8, in favour of the ancestor of defendants and respondents Nos. 13 to 15, which mortgage was transferred on the 4th January, 1910, to the plaintiff appellant; defendants and respondents Nos. 9 to 12, claim title to certain of the lands in mortgage.

The mortgage recites that the mortgagor had borrowed Rs. 398, in order to pay the Government revenue, and the covenant is in the following terms:—

"I will repay the aforesaid sum together with interest at the rate of Rs. 2-8-0 per cent. per mensem, in the month of Aghan, Sambat 1942, without any plea or excuse, and I will continue to pay the interest every six months. If I fail to pay interest at the end of any six months, I will pay interest at the rate of Rs. 3-2-0 per cent. per mensem from the date of the execution of this bond, and that amount of interest shall be added to the principal"

As at the date of the suit no payment had been made in respect of interest or principal, the total debt had swollen with compound interest to more than 3 lacs of rupees.

The plaintiff purchased the mortgage for Rs. 6,500. In the deed of transfer the transferor covenanted that in case the transferee did not realize Rs. 6,500 upon the mortgage he would make up the difference. When the plaintiff brought her suit she reduced her claim to the principal, Rs. 398, and Rs. 19,602 interest, making a total of Rs. 20,000.

1. (1911) I. L. R. 34 All. 126. 2. (1890) L. R. 18 I. A, 1.

P. C.

Nawab Nazir v. Rao Raghunath Singh

Lord Phillimore.

Various defences were set up by the defendants 1 to 12, but they were all rejected by the Subordinate Judge, who made a decree in favour of the plaintiff for Rs. 20,000 with interest from the date of suit, and costs. Thereupon the defendants 1 to 12 appealed to the High Court of Judicature for the North-Western Provinces, which Court affirmed in most respects the decree of the Subordinate Judge, but reduced the amount decreed upon the mortgage to Rs. 1,778-4-0, a sum arrived at by adding to the principal simple interest at the rate of 12 per cent.

In the written statement filed on behalf of the defendants, one of the points taken was that the property mortgaged was ancestral property, and that there was no legal necessity to execute the document sued upon.

In the view which the High Court took of this plea, a view from which their Lordships see no reason to differ, it made it open for the defendants to contend that though the necessity for borrowing the principle sum was accepted there was no necessity to borrow on the very onerous terms of this mortgage.

This line of defence being thus open to the defendants, the principles laid down by this Board in *Rajah Hurronath Roy Bahadur* v. *Rundir Singh* [1] and *Nand Ram* v. *Bhupal Singh* [2] apply.

It is incumbent on those who support a mortgage made by the manager of a joint Hindu family to show not only that there was necessity to borrow, but that it was not unreasonable to borrow at some such high rate and upon some such terms, and if it is not shown that there was necessity to borrow at the rate and upon the terms contained in the mortgage that rate and those terms cannot stand.

This principle being established, the High Court was justified in finding that a mortgage upon such terms as those contained in the document sued upon, the lands charged being of such value as to make the security ample, was an unnecessary extravagance.

No evidence, it is true, was given on either side, but the thing spoke for itself.

It remains, therefore, that there was necessity and, in virtue of that necessity, authority to borrow upon reasonable commercial terms, and that the mortgage stands as good security

1 (1891) L. R. 18 I. A. 1.

2 (1911) I. L. R. 34 All. 126.

P. C.

Nawab Nazir v. Rao Raghunath Singh.

Lord Phillimore.

to that extent, but that all terms of the mortgage in excess of this necessity are outside the scope of the authority.

What the particular rate of interest should be, and whether the money could have been borrowed at simple, instead of compound, interest are matters of detail upon which the High Court with its local knowledge can well be left to decide, and their Lordships are not disposed to interfere with the decision upon points such as these. There is, however, a passage in the judgment of the High Court upon which they desire to offer some observation. The learned Judges say :—

"We have a discretion in the matter and we think we should be justified in reducing the rate of interest to a reasonable figure. In view of the security given to the mortgagee, and also of the fact that unusually long delay has been made in bringing the suit, we think that simple interest at rate of 12 per cent. per annum, would be amply sufficient to compensate the mortgagee or his representative for the interest which he should get on the principle amount of the loan."

This may have some relation to the following allegation in the defendants' pleading. "The condition relating to interest was very hard, unconscionable and inequitable." But that allegation does not seem to have been intended as a substantive plea in itself, but rather as introductory to a plea of undue influence which failed. However this may be, their Lordships do not think it safe to rest their decision upon a supposed discretion in the Court or an inference by the Judges as to the sum which would be sufficient to compensate the mortgagee. In their view, as already stated, the question is one of the authority of a manager of a joint Hindu family and it is because their Lordships agree with the High Court that this authority was exceeded to the extent already stated that they concur in the conclusion at which that Court arrived.

The appeal accordingly fails, and should be dismissed as against the defendants respondents Nos. 1 to 12.

As regards the original defendants Nos. 13 to 15, or their present representatives, it seems that they were at one time represented by the solicitors who have appeared for the other respondents, but that this appearance has been withdrawn, and the appeal so far as they are concerned has been heard *ex parte*.

If the decision of the Subordinate Judge had not been varied there would have been no ground for asking for any relief against them. If the variance had not been so great, if the judgment had been allowed to stand for any sum not less than Rs. 6,500,

P. C.
Nawab Nazir v. Rao Raghunath Singh.
Lord Phillimore.

there would still have been no ground for seeking relief from them. It was only after the decree of the High Court reducing the sum due on the judgment below Rs. 6,500, that any question arose. It would appear that by the terms of the sale deed this difference would have to be made up by the defendants Nos 13 to 15. Whether any application was made to the High Court after the delivery of its judgment for consequential relief against these defendants, whether there was any opportunity for making an application, and why, if so, no application was made there is nothing in the record to show. *Prima facie* it would appear that there could be no answer to such an application; but upon the whole their Lordships think that it will be safer to remit this matter to the High Court and to give the plaintiff an opportunity of making the proper application there.

Their Lordships will therefore humbly advise His Majesty that this appeal be dismissed as against the respondents Nos. 1 to 12 with costs, and that as between the appellant and the other respondents, the cause be remitted to the High Court with liberty to the appellant to make such application to the High Court as she may be advised.

Solicitor for Appellant:—*E. Dalgado.*

Solicitors for Respondents:—*Barrow Rogers & Nevill.*

A. P. P.

PRIVY COUNCIL.

PRESENT.—VISCOUNT HALDANE, VISCOUNT CAVE, LORD PHILLIMORE, SIR JOHN EDGE AND MR. AMEER ALI.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Raghubar Dayal ... *Plaintiff—Appellant.**

v.

The Bank of Upper India, Ltd. (in liquidation) ... *Defendant—Respondent.*

P. C.
Raghubar Dayal v. The Bank of Upper India, Ltd.

Company—Compromise or arrangement with creditors—Sanction of Court—Date from which compromise or arrangement sanctioned by Court becomes binding—Indian Companies Act, 1913 (*Act VII of* 1913) *S.* 153.

The compromise or arrangement contemplated by S. 153 of the Indian Companies Act, 1913, (Act VII of 1913) becomes binding from the date when it is arrived at, subject to subsequent sanction by the Court. If that sanction be

* P. C. Appeal No. 5 of 1917. 31st January, 1919.

refused, the agreement is without effect; but if sanction be given, the agreement takes effect not from the date of sanction, but from the date when it is made.

P. C.
Raghubar Dayal v. The Bank of Upper India Ltd.

Appeal from a decision of the Court of the Judicial Commissioner of Oudh, dated September 16, 1916, modifying an order of the Subordinate Judge of Lucknow.

The material facts are stated in their Lordship's judgment. The Sub-Judge dismissed plaintiff's application in execution with costs. The learned Judges of the Judicial Commissioner's Court (Stuart and S. Mohammad Ali) modified the Lower Court's decree by allowing plaintiff's claim for the costs included in the decretal amount, remarking that "he instituted his suit two days before the application to the Allahabad High Court was made and we see no reason why he should be deprived of this right to execute his decree for costs as against the assets of the Bank." The costs were about one-twenty-seventh of the amount claimed, and the Appellate Court directed that "the parties will receive and pay costs (of the application in execution) in proportion to success and failure."

Plaintiff appealed.

De Gruyther, *K. C.* and *Dube*, for appellant submitted that the arrangement or scheme under S. 153 of the Indian Companies Act had no retrospective effect. The scheme becomes binding from the date of the sanction, not before it. It was not binding on the appellant, who obtained his decree prior to the date when the arrangement was sanctioned.

Dunne, *K. C.* and *O'Gorman*, for respondent, were not called on.

Their Lordships' judgment was delivered (31st January 1919) by

Viscount Haldane.

Viscount Haldane :—If this was a difficult case their Lordships would take time before formulating their report. But the case appears to them to be one of no difficulty.

S. 153 of the Indian Companies Act provides that :—

"Where a compromise or arrangement is proposed between a company and its creditors, or any class of them, or between the company and its members, or any class of them, the Court may on the application in a summary way of the company, or of any creditor or member of the company, or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors, or class of creditors, or of the members of the company, or class of members, as the case may be, to be called, held, and conducted in such a manner as the Court directs."

Then by the second part of the section :—

"If a majority in number representing three-fourths in value of the creditors, or class of creditors, or members or class of members, as the case may be, present either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors, or the class of creditors, or on all members, or class of members, as the case may be, and also on the company, or, in the case of a company in the course of being wound up, the liquidator and contributories of the company."

P. C.

Raghubar Dayal v. The Bank of Upper India Ltd.

Viscount Haldane.

In this case the Bank of Upper India closed its doors. The appellant was a customer of the bank who had a fixed deposit with it, which became repayable by the bank on the 4th November, 1914. Before that day, on the 8th August, the bank had suspended payment. The appellant, on the 19th December began a suit for his money, and on the 19th April, 1915, he got a decree for payment. The amount was over Rs. 25,000. So much for the proceedings of the appellant.

Now we turn to what happened in connection with the bank in order to see how S. 153 comes into operation. In October there was a meeting of creditors, and on the 15th December there was an application to the High Court for an order under S. 153. On the 23rd December, two days after, an order was made directing the creditors to meet and consider the scheme, and on the 4th March, 1915, they did meet and they passed a resolution sanctioning the scheme by the requisite majority. A little later, on the 2nd June of the same year, the Court gave its sanction. It will be observed therefore that the plaintiff's decree on the 19th April was granted to him before the order confirming the resolution, but after the meeting at which the resolution and the scheme to which it related had been agreed on.

The question is whether under S. 153 (which is a section in familiar language, practically identical with the corresponding section of the English Companies Act) the creditor was bound. The Court of the Judicial Commissioner, agreeing with the Judge who heard the case in the first instance, says that it was so, and it is obvious that it is convenient that it should be so. Otherwise, with the uncertainty as to what the ultimate rule of the Court may be, when a decision has finally been obtained, the door would be open for a race between creditors and persons concerned in administering the affairs of the bank. The Court of the Judicial Commissioner put it very well in its judgment when it said this :—

"If it had been the intention of the Legislature that such an agreement should not be binding until the arrangement had been sanctioned by the Court, instead of the words 'if sanctioned by the Court' the words 'when it has been sanctioned by the Court' would ordinarily have been used. The agreement becomes binding from the date when it is arrived at, subject to subsequent sanction by the Court. If that sanction be refused, the agreement is without effect But it is not the case that the agreement is to take effect from the date of sanction. It

takes effect from the date when it is made Such is our interpretation of the words of the section."

P. C.

Raghubar Dayal v. The Bank of Upper India Ltd.

Viscount Haldane.

When you look at the latter part of S. 153 it appears that this is so, because the words there are that if the compromise or arrangement, which is the compromise or arrangement sanctioned by a majority of the meeting, is passed, then the compromise or arrangement, if sanctioned by the Court, is to be binding. It is the proceeding of the meeting that is to be binding, provided only that it does not fail to be subsequently sanctioned. Therefore, not only convenience, but the literal language of the section, is in favour of the view to which the Court below adhered, and their Lordships will humbly advise His Majesty that that view should be affirmed, and that the appeal should be dismissed with costs.

Solicitors for Appellant :—*T. L. Wilson & Co.*

Solicitor for Respondent :—*Torr & Co.*

A. P. P.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR JOHN WALLIS, CHIEF JUSTICE AND MR. JUSTICE SPENCER.

Nanikutti *alias* Narayani Kutti Amma and others ... *Appellants * in both (Plaintiffs.)*

v.

Kotale Patnihare Puthiyapuril Achutan Kutti Nair, Karnavan and manager of the tarwad and others. ... *Respondents in both. (Defendants* 1, 2, 4, *to* 6, 8, *to* 17, 19, *and* 20 *and* 18*th, deft's L. R.*)

Nanikuti v. Achutan Kutti Nair.

Malabar Law—Tarwad—Partition—Mode of—Division per stirpes *and division* per capita—*Minor members, when entitled to re-open a partition.*

There can be no partition of the properties of a Malabar tarwad except by the consent of all the adult members. Such a partition would ordinarily be binding on the minor members as well, but if on attaining majority they are able to show that they had been prejudiced, the partition could be re-opened so far as they are concerned and they would be awarded the share which should have been set apart for them.

Where certain members of a Tarwad sued to set aside a partition of a Tarwad properties, effected during their minority, on the ground that the division ought to have been capital and not stirpital, *held* that division *per stirpes* or by tavazhis, was the more approved form of partition in Malabar and that the plaintiffs were not entitled to avoid the partition on the ground set up by them.

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* S. A. Nos. 1266 and 1267 of 1917. 8th October, 1918.

Nanikutti v. Achutan Kutti Nair.

Veluthakal Chirudevi v. *Veluthakal Tarwad Karnavan* [1], *Yachuri Ramamurti* v. *Yachuri Ramanna* [2], *Sulaiman* v. *Baiyatumma* [3]. Relied on.

Second Appeal against the decree of the Court of the Temporary Sub-Judge of Palghat at Calicut dated 19th February 1917 in A. S. Nos. 784 and 814 of 1914 respectively preferred against the decree of the Court of the District Munsif of Alattur in O. S. No. 45 of 1913.

C. Madhavan Nair, for Appellants.

K. P. M. Menon, C. V. Ananthakrishna Aiyar, A. Sivarama Menon, K. B. Venkatachella Aiyer and *T. Eroman Unni* for Respondents.

The Court delivered the following

Judgment :—In view of the findings of the Lower Appellate Court in these cases Mr. C. Madhavan Nair, who appears for the appellants, has only questioned the decision as regards the partition deed, Exhibit C. This raises a question of Malabar Law of some importance on which we have derived much assistance from his argument, and those of Mr. K. P. M. Menon and Mr. C. V. Ananthakrishna Aiyar for various respondents. The division under Exhibit C, is a division of the tarwad properties *per stirpes,* that is to say, allotting an equal share to each *strip* or tavazhi. It is of course well settled in Malabar that there can be no partition at all, except by the consent of all the adult members. As regards the minor members of the tarwad it was observed by Sankaran Nair, J., in *Veluthakal Chirudevi* v. *Veluthakal Tarwad Karnavan* [1] "such a partition would ordinarily be binding on the minors, but if on attaining majority, they are able to show that they have been prejudiced, that partition could be re-opened so far as they are concerned, and they would be awarded the share which should have been set apart for them ; but subject to this, the partition is final as between those who were parties to it." This appears to be an application of the similar principle which has been applied with regard to partitions on the East Coast. As to such partitions Mr. Ananthakrishna Aiyar has referred us to the decision of Srinivasa Aiyangar, J., in *Yachuri Ramamurthi* v. *Yachuri Ramanna* [2] where it was pointed out that partitions effected by the adult members of the family are

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1. (1916) 31 M. L. J. 879, 881. 2. (1916) 30 M. L. J. 308.
3. (1916) 32 M. L. J. 137 (P. C.)

Nanikutti v. Achut an Kutti Nair.

binding on the minor members, in the absence of negligence or fraud. The only question then is whether this partition, which is by consent, can be upset at the instance of certain members of the tarwad who were minors on the ground that the division was *per stirpes* and not *per capita*. Now the authoritiest to which Mr. Ananthakrishna Aiyar has called our attention show conclusively that partition *per stirpes* or what comes to be the same thing, partition by tavazhis, has, to say the least, a greater body of authority in its favour than partition *per capita*. He has referred us to Strange's Manual of Hindu Law, Section 389 where it is said that where such divisions are made, they would naturally be by tavazhis. Mr. Ormsby who was Chief Justice of Travancore, in his book on Marumakkathayam Law, says, at page 2, paragraph 4, "where division takes place it will usually be according to Taivaries, or number of daughters of the original ancestress. Each Taivari may similarly be sub-divided, should the members consent thereto, and so on until individual proprietorship is arrived at. I am not aware that this rule has ever been questioned." The fullest discussion of the question is to be found in Dr. Pandalai's Marumakkathayam Law, 1914, page 146 (which was not referred to before us) where the same result is arrived at, and several decisions of the Travancore High Court are referred to. In a recent case which came before the Privy Council *Sulaiman* v. *Baiyatumma* [1], their Lordships alluded at page 141 to this method of division by tavazhis as the proper mode of division. They say that this division "was merely an application of the rule that division for the purpose of partition is stirpital, though as between the members of any one class it is capital." Mr. Madhavan Nair explained this by saying that it only meant that divisions should be by tavazhis, but did not lay down that each tavazhi should have an equal share. But a division *per stirpes* which gave each *stirp* an unequal share depending on the number of members in it would be very like a division *per capita*, and was not we think what their Lorships intended. This division by Exhibit C has been made in what appears upon authority, to be the more approved form, and therefore we think that the plaintiffs can have no right to question a partition effected in this manner.

1 (1916) 32 M. L. J. 137.

Nanikutti v. Achutan Kutti Nair.

Further we have to bear in mind that a partition in Malabar depends upon the consent of all parties, and if we were to uphold the plaintiff's contention, the only result would be to set this partition aside and to restore the original state of unity, because division *per capita* would, in this case, be without the consent of all the adult members. It appears that with regard to some of the property of this family, it was divided *per capita* by Exhibit B. That division is not attacked in the present case and we have not to consider it. What is contended is that the partition under Exhibit C should also have been *per capita*, and should be upset because it is *per stirpes*. We are clearly of opinion that there is no ground for this contention.

Therefore the appeal fails and must be dismissed with costs. S. A. No. 1267 of 1917 is also dismissed with costs.

In Memorandum of Objections in S. A. No. 1267 of 1917.

We must allow the memorandum and increase the fee in the Lower Appellate Court from Rs. 20 to 95. There will be no order as to costs in this Memorandum of Objections.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SADASIVA AIYAR AND MR. JUSTICE SPENCER.

C. Venkatachariar ... *Appellant** (*Plaintiff*)

v.

C. Rangasami Aiyar and another... *Respondents* (*Defendants 1 and 2.*)

Venkatachariar v. Rangasami Aiyar.

Landlord and tenant—Permanent lease prior to the coming into force of the Transfer of Property Act—Assignee of the title of the lessor in a permanet lease—Lessee denying the title of—Whether lease forfeited—Whether notice to take advantage necessary preliminary to ejectment.

Where the plaintiff, the assignee of the lessor's interest in a permanent lease of the year 1839, sued in ejectment against the permanent lessee, on the ground that the permanent lease was forfeited by the lessee's denial of the plaintiff's title. *Held*, that the plaintiff was entitled to succeed though he had not given any notice that he would take advantage of the forfeiture.

A permanent heritable tenancy can be forfeited by a denial of the landlord's title.

Rama Iyengar v. *Gurusami Chetti* [1], *Kally Dass Ahiri* v. *Monmohini Dassi* [2], followed.

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* S. A. No. 979 of 1917. 2nd October, 1918.

1. (1918) 35 M. L. J. 129.

2. (1897) I. L. R. 24 Cal. 440.

Venkatachariar v. Rangasami Aiyar.

The denial of a derivative title, as that of the plaintiff in the present case, can work a forfeiture of the tenancy.

Durga Kripa Roy v. *Sri Janoo Lathak* [1], dissented from.

Rama Iyengar v. *Gurusami Chetty* [2], followed.

In the case of leases prior to the coming into force of the Transfer of Property Act where there is a forfeiture by disclaimer of the landlord's title, no separate preliminary act on the part of the landlord is necessary to enable him to maintain a suit in ejectment.

Rama Iyengar v. *Gurusami Chetty* [2], followed.

Second appeal against the decree dated the 27th September 1916 of the Court of the Temporary Subordinate Judge of Salem in A. S. No. 216 of 1915 preferred against the decree dated the 17th August, 1914 of the Court of the District Munsif of Dharmapuram in O. S. No. 140 of 1913.

V. C. Seshachariar, A. Krishnaswami Aiyar and *K. V. Sesha Aiyangar,* for Appellant.

K. Srinivasa Aiyangar and *B. Somayya,* for Respondents.

The Court delivered the following

Sadasiva Aiyar, J.

Judgments.—*Sadasiva Aiyar,* J.:—The plaintiff is the appellant. He purchased the plaint village of Bojinaickampatti (or Posinaickanpatti) from Narasimhalu Naidu who acted on behalf of himself and his brother. They made the said sale as Mittadars in 1901 under Ex. III. Plaintiff had formerly brought a suit for rent against the defendants, who had obtained a kayam saswatam lease in 1839 from the original mittadars. The suit for rent was O. S. No. 988 of 1904. In that suit, the defendants (the kayam saswatham lessees) denied that the plaintiff was the owner of the mitta and denied also the title of the plaintiff's vendors, Narasimhalu Naidu and his brother, to sell the property to the plaintiff. They set up the title of Venkatarama Naidu, (the father of the plaintiff's vendors) who had parted with his rights in favour of his sons in 1897. The first court decreed that suit of 1904 brought for rent overruling the lessees' objections and establishing the title of the plaintiff as landlord. The lessees appealed, denying again in the appellate court the plaintiff's title as landlord and continued such denial, notwithstanding that Venkatarama Naidu (the father of the plaintiff's vendors, who had been made a party to the suit) mentioned in an application made to the appellate

1. (1872) 18 W. R. 465. 2. (1918) 35 M. L. J. 129.

Venkatachariar v. Rangasami Aiyar.

Sadasiva Aiyar, J.

court that he did not want any longer to contest the plaintiff's title in that particular suit and his name was thereupon removed from the record on his expressing the intention of putting an end to the plaintiff's title afterwards by instituting a future suit for cancellation of the deed executed by him in favour of his sons. The lessees failed in the appeal also and yet they preferred a second appeal again denying the plaintiff's title as landlord. On these facts and also on the allegation that before the filing of the present suit in ejectment (on the ground of forfeiture by denial of the landlord's title of those by the defendants), the plaintiff sent a notice to the defendants on the 25th January 1908 requiring them to deliver up possession of the village, the plaintiff instituted the present suit for possession.

The defendants set up that the plaintiff's two brothers not having joined him in the suit, the suit was bad for non-joinder, that the plaintiff's purchase was bad for champerty and maintenance, that the defendants had a permanent lease right and that no notice of intention to take advantage of the alleged forfeiture was given in 1908 as alleged by the plaintiff.

The District Munsif held on a construction of the kayam lease deed (Ex. I of 1839) that it did confer a permanent heritable right of defendants' predecessor-in-title. He however decided that the defendants incurred forfeiture of that right of permanent tenancy by their denials of the plaintiff's title as their landlord not only in the written statement in the former suit in the first court but also by their denials in the District Court and the High Court. He states in the 10th paragraph of his judgment that "There was a clear and *mala fide* denial of plaintiff's title in the District Court and also in the High Court and that there was a forfeiture." He further found that the plaintiff had given the notice, Ex. K, insisting on the forfeiture. The learned District Munsif was further of opinion that no notice to quit was necessary under the circumstances because, (I take it) the Transfer of Property Act was not applicable to the rights and conditions of the lease Ex. I created in 1839. As regards non-joinder of plaintiff's brothers, one of them as plaintiff's witness denied that plaintiff's brothers had any right. This contention of the defendants though thus patently frivolous was persisted in the appeal memorandum.

Venkatachariar v. Rangasami Aiyar.

Sadasiva Aiyar, J.

On appeal, the learned Subordinate Judge agreed with the District Munsif in holding that the Kayam lease deed, Ex. I, conferred a permanent heritable right. On the other question, *viz.*, the question of forfeiture, however, he held that as the defendants did not attorn to the plaintiff after the purchase of the mitta village by the latter in 1901, the denial by the defendants of the plaintiff's title as landlord did not work a forfeiture. As regards the question whether their denial was *bona fide* or not, he does not give any definite finding except that the denial at the time of the written statement in the first Court in the former suit may not have been *mala fide*. The Subordinate Judge admits that the defendants made an unsuccessful attempt before the plaintiff's purchase to buy the property themselves from Narasimhalu Naidu and his brother and he also admits that the defendants "attempted to attach the plaintiff's right" as mittadar of this village in a suit instituted by them against the plaintiff and others. He observes "that these two facts can never be said to be recognition of plaintiff's title." So far as the first fact is concerned, it may not be a recognition of the plaintiff's title though it was clearly a recognition of plaintiff's vendor's title. As regards the second fact (See Ex. D which is an application by defendants for attachment of plaintiff's right as mittadar), I am wholly unable to understand the Subordinate Judge's observations that it is not a recognition of plaintiff's title As regards the notice Ex. K, the Subordinate Judge does not give any finding as to whether it was sent by the plaintiff or not. He however found in para. 15 of his judgment that such a notice was not necessary, if a forfeiture had been incurred.

In this second appeal, the questions which have been argued before us are: (1) whether the lease deed Ex. I conferred a permanent heritable right or only a right during the lifetime of the grantee, (2) whether there have been several denials of the plaintiff's title during the course of the former suit of 1904, (3) whether any or all of those denials entailed a forfeiture of the tenancy, (4) whether any notice showing an intention to take advantage of the forfeiture was necessary, even after such denials, as a pre-requisite for the maintainability of this suit, and (5) whether notice, Ex. K was really given. So far as the first point is concerned, I do not think it is

Venkatachariar v. Rangasami Aiyar.

Sadasiva Aiyar, J.

necessary to give any final decision though it should not be thought that I agree with the lower Courts in their construction of Ex. I. If the matter were res *judicata* I might probably have agreed with them. But having regard to the cases in *Rajaram* v. *Narasinga* [1], *Venkataramana* v. *Venkatapathi* [2] and *Foulkes* v. *Muthusami Gounden* [3]. I am not sure whether the question is not concluded by authority in favour of the restricted right of the grant as merely a grant for the lessee's life-time. However, as I said, it is unnecessary to express any final opinion on that point for the decision of this case.

Assuming that Ex. I created a permanent heritable tenancy, it is clear that even such a tenancy can be forfeited by a denial of the landlord's title. See *Rama Aiyangar* v. *Gurusami Chetti* [4] and *Kallydass Ahiri* v. *Monmohini Dassee* [5]. It was argued for the respondents that a denial of a derivative title can in no circumstances work a forfeiture and the case in *Doorga Kripa Roy* v. *Sree Janoo Lothak and others* [6] was relied upon. That case was quoted in *Rama Aiyangar* v. *Gurusami Chetti* [4] but was dissented from, and I respectfully adopt the reasoning in the judgment in *Rama Aiyangar* v. *Gurusami Chetti* [4] on this point.

So far as the question of denials in the former suit is concerned, there can be no hesitation on a perusal of the records of the former suit (Ex. A, B, C, II, IV, XIV), in holding that the lessees denied the plaintiff's title on different occasions, and in each of the courts through which that litigation passed, and so far as the court of appeal and the court of second appeal are concerned, such denial could not have been *bona fide*. If a tenant honestly doubtful and not intending to identify himself with a 3rd party who sets up a title in himself against the real landlord merely puts his alleged derivative landlord to the proof of the latter's title before the tenant would recognise him as such, such conduct may not work a forfeiture of the tenancy and may not constitute such a disclaimer of the title of the landlord as would work a forfeiture. But it is impossible to hold, having regard to the defendant's conduct both in the former suit and in this suit, that the defendants did not intend to disclaim

1. (1891) I. L R. 15 M. 199.
2. (1915) 28 M. L J. 510.
3. (1898) I. L. R. 21 M. 503.
4. (1918) 35 M. L. J. 129.
5. (1897) I. L. R 24 C. 440
6. (1872) 18 W. R. 465.

the plaintiffs title and their tenancy under the plaintiff but merely in good faith wanted to have their doubts cleared whether the plaintiff was their legal landlord or whether anybody else was their legal landlord. The question whether there was a denial in appeal and in second appeal in the former litigation was not decided by the Lower Appellate Court in this case, but upon the admitted facts there can only be one conclusion, and that is that the denial by the defendants was deliberate and malicious and that they did not care whether Venkatarama Naidu still owned the landlord's title or not, their only object being to defeat the plaintiff by all means even after Venkatarama Naidu practically gave up his contest with the plaintiff.

Then the next question is whether a separate act by the plaintiff indicating his intention to act upon the forfeiture is a necessary pre-requisite for the maintainability of the suit. It is clear that the Transfer of Property Act does not apply to this lease because the lease was created in 1839 long before the Transfer of Property Act was enacted. I am further of opinion that it is an agricultural lease and on that ground also the Transfer of Property Act does not apply. (The same view has been held in *Padmanabhayya* v. *Ranga* [1] and *Rama Aiyangar* v. *Gurusami Chetti* [2], in respect of leases prior in date to the Transfer of Property Act.) We are therefore thrown back upon the law as it existed before the Transfer of Property Act came into force. That law has been fully considered in the case in *Rama Aiyangar* v. *Gurusami Chetti* [2], and I agree with the conclusion arrived at therein that where there was a forfeiture by disclaimer of landlord's title, no separate preliminary act on the part of the landlord is necessary to enable him to maintain a suit in ejectment. The case in *Venkatarama Bhatta* v. *Gunda Ranga* [3] quoted for the respondents has been explained in *Padmanabhayya* v. *Ranga* [1] and that explanation seems to have been accepted in *Rama Aiyangar* v. *Gurusami Chetti* [2] also. Assuming however, that notice is necessary the Munsif found that the plaintiff did send the notice, Ex. K. The plaintiff has gone into the box and proved that he sent the notice and had it properly served through his Amin. The 1st defendant's denial is worthless. I see no reason to disbelieve the plaintiff, Ex. K

1. (1910) I. L. R. 34 M. 161. 2. (1918) 35 M. L. J. 129.
3. (1908) I. L. R. 31 M. 403.

Venkatachariar v. Rangasami Aiyar.

Sadasiva Aiyar, J.

containing the usual endorsement by the person who served the notice, that a copy was left with the person who received it. As the Appellate Court has not dissented from the finding of the Munsif on this question and has not given a finding of its own I think we are entitled to find it ourselves.

In the result I would reverse the decision of the Lower Appellate Court and restore that of the District Munsif except that the figure for damages Rs. 1,000 mentioned in the Munsif's decree be altered into Rs. 750 at Rs. 250 a year in accordance with the finding of the Lower Appellate Court on that question. The respondents will pay the plaintiff's costs throughout.

Spencer, J.

Spencer, J :—I agree.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE OLDFIELD AND MR. JUSTICE SESHAGIRI AIYAR.

Polita Pavana Panda and others ... *Petitioners* * (*Defendants 2, 3, 4, 6, 7, and 11*).

v.

Narasinga Panda and others ... *Respondents* (*Plaintiffs 1 and 2 and Defendants 5, 8 and 10*).

Polita Pavana Panda v. Narasinga Panda.

C. P. C. Sch, II, Para 1—Arbitration—Reference to—Validity—Ex parte *defendant interested in reference not being a party to same—Effect—" Person interested"—Ex parte defendant, if a.*

A defendant who is *exparte* may be a party interested within the meaning of Sch. II, Para (1) of the Code of Civil Procedure.

Where an *exparte* defendant, who was interested in the whole suit as well as in the particular subject-matter of the reference, was not a party to the same, *held* that the order of reference was *ultra vires* and without jurisdiction.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the decree and the Judgment of the Court of the Temporary Subordinate Judge of Ganjam at Berhampore in O. S. No. 22 of 1915.

C. V. Ananthakrishna Iyer for *The Hon. the Advocate General* and *C. S. Venkatachariar* for Petitioners.

P. Narayanamurthi with *C. Sambasiva Rao Counsel* and *N. C. Vijiaraghavachariar* for Respondents.

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* C. R. P No. 112 of 1918 16th and 23rd January, 1919.

Polita Pavana Panda v. Narasinga Panda.

The Court delivered the following

Oldfield, J.

Judgments :—*Oldfield, J.*—I have had the advantage of reading the judgment to be delivered by my learned brother and, as I agree with it, I propose to deal with one aspect of defendants' case.

Stated at its strongest, their case was that their dispute with plaintiff and 23rd defendant involved adjudication on two distinct matters, firstly their right and plaintiffs' to recover the property in 23rd defendant's possession from him, secondly, their rights as against plaintiffs to a particular share in it if it in fact was recoverable. On the first point for the reasons given by my learned brother, there could be no valid submission to arbitration without 2nd defendant's concurrence and although the record does not indicate what method of decision, if any, was really in the parties' minds the wording of paragraph 2, Ex. I, is in fact inconsistent with any intention on their part to submit this part of the case. But, it is argued, the absence of any valid submission on this point does not affect the validity of the submission on the other above referred to, in which 23rd defendant had and could have no interest, since, if he was to surrender the property, the shares in which it was afterwards to be divided would not be his concern. It is possible that there is nothing in S. 1, Sch. II of the Code of Civil Procedure irreconcilable with this statement of the defendants' case and that the interest of the parties contemplated therein is in the question referred, not in the case as a whole. But it is unnecessary at present to decide whether that is so, because the assumption in defendants' argument, as stated above that 23rd defendant had no interest in the result of the submission to arbitration is incorrect in two respects. For, firstly, the submission included the question of the validity of an adoption, on which plaintiff's rights to sue at all depended ; and secondly, 23rd defendant, if he purchased in good faith, may be entitled to have his items assigned, to his alienor in order that his transfer might, so far as possible, remain effective. In these circumstances the submission cannot be accepted as valid ; and I therefore concur in the decree proposed by my learned brother.

Seshagiri Aiyar, J.

Seshagiri Aiyar, J :—Plaintiffs and defendants 1 to 10 claim to be the nearest heirs of the deceased owner of the plaint

Polita Pavana Panda v Narasinga Panda.

Seshagiri Aiyar, J.

properties. The suit was brought for a division of the properties and for setting aside certain alienations in favour of the other defendants. There was a dispute among the heirs as to whether adoptions set up by the defendants 1 to 7 were true and valid. After the settlement of the issues on the 25th September 1916, plaintiffs and defendants 1 to 11 agreed that the matter in dispute should be referred to the decision of three arbitrators. Paragraph 3 of the agreement says: "They have further agreed that the rest of the defendants except the 23rd defendant who was declared *exparte* be exonerated from the suit with the respective properties in their possession as per schedule attached thereto." That is to say, their heirs agreed that the alienations in favour of defendants other than the 23rd, should not be contested. Apparently as the 23rd defendant was *exparte*, they did not exonerate his property from the suit. It was suggested by Mr. Narayanamurthy that in fact the claim against the 2nd defendant was withdrawn. There is nothing on record to justify such an assumption. On the other hand the express language of the agreement to refer shows that the alienation in favour of the 23rd defendant was not accepted as binding. Subsequent to the agreement on the 17th of April 1917, the plaintiffs and the defendants 1 to 7 settled the shares to which they were entitled and asked the arbitrators to determine after examining the parties themselves the following issues: "1st part of the 2nd issue, 8th issue, 9th issue, 10th issue, 11th issue, 12th issue and 15th issue." The arbitrators by a majority decreed the claim in a particular manner. There was a minority decision also. The court accepted the award of the majority and passed a decree in accordance therewith. Against that decree the present petition has been presented.

The main objection argued by Mr. Ananthakrishna Aiyar related to a point not specifically put forward in the Court below. But as that relates to jurisdiction. I fail to see how we can refuse to adjudicate upon it. The short point is this. The 23rd defendant was a party against whom relief was claimed in the original plaint. He was *exparte*. In the agreement to refer the parties to the reference did not exonerate him from liability. In these circumstances, is the reference a valid one and had the Court jurisdiction to accept the reference and to

Polita Pavana Panda v. Narasinga Panda.

Seshagiri Aiyar, J.

act on it? I am constrained to hold that the court had no jurisdiction to refer the dispute to arbitration. It is to be regretted that the legal advisers should not have taken steps either to include the 23rd defendant in the reference or to exonerate him in terms from liability.

The question turns on the interpretation to be placed upon the words "parties interested" in S. 1 of the second schedule to the Civil Procedure Code. In the old Code of 1882, S. 506 provided "if all the parties to a suit desired and so on." In the place of those words we have in the present section these words: "Where in any suit where the parties interested agree". It was strenuously argued by Mr. Narayanamurthy that if a person is *exparte* he is not an interested party. He is supported by some authority which with all deference I am unable to follow. It has been consistently held in Allabhabad that if a person is *exparte* he is not a party interested *Ishar Das v. Herat Deo* [1] and the earlier cases have taken this view. Reference may also be made to *Ajudhia Prasad* v. *Badar-ul Hussain* [2]. In *Vaithianatha Iyer* v. *Vaithilinga Mudaliar*[3] a Bench ofthis Court took the same view. Phillips, J says: "further in the present case the appellant has no equitable claim to set aside the decree, for by remaining *exparte* he left the conduct of the suit in the hands of the Court, and it is really immaterial to him whether the suit was decreed upon examination of witnesses in court or upon an award made by arbitrators. By not contesting the suit he submitted to whatever decree might be passed provided that it was not in exess of the relief claimed." With all deference I am unable to accept this conclusion. A person may remain *exparte* for various reasons. He may be too poor to defend the suit. He may think that his co-defendants would fight his case and that it is not necessary for him to put in a separate defence. He may trust to some obvious defect in the case of the plaintiff which should attract the attention of the Judge. He might also have kept away from the Court because he had confidence in the judicial capacity of the presiding officer. These considerations do not apply to a reference to arbitrators. The *exparte* defendant knows nothing about their capacity, character or antecedents. Simply because a defendant is *exparte* it does not

1. (1910) I. L. R. 32 All 657. 2. (1917) I. L. R. 39 All. 189.
3. (1915) 18 M. L T. 374.

Polita Pavana Panda v Narasinga Panda.

Seshagiri Aiyar, J.

follow that he consented to his case being decided by arbitrators. Further if a person is *exparte* he has got a right of appeal if the decision goes against him. He may satisfy the appellate court that on the materials placed before the Judge, his conclusion was wrong or that the Judge had taken a wrong view of the law, or that the procedure had been irregular. In the case of an award all these rights could not be exercised. Therefore by remaining *exparte*, defendant cannot be said to have consented to the arbitrators disposing of his case and to giving up all rights of appeal against the decision that may be passed against him. After giving my best consideration, to the cases which have been cited I am unable to accept the view taken in them that a defendant who is *exparte* is not interested in the dispute. As regards *Sivalinga Pillai* v. *Marutha Pillai* [1] it is enough to say that in that case it was held that the *exparte* defendant had no interest in the suit. On the other hand, in *Girija* v. *Kanai Lal* [2] and the earlier case in *Seth Dooly Chand* v. *Mamuji Musaji* [3] it was held that the *exparte* defendant does not cease to be an interested party.

The next argument was that there is nothing to prevent a few among the parties to the suit adjusting their differences by submitting them to the decision of arbitrators. Granting for a moment without deciding that a partial reference is possible because a partial compromise is allowed by law and also a partial adjustment, it is not clear whether a partial award is within the rights of the parties—I am however not prepared to hold that in this case the 23rd defendant was not interested in the decision of the question which plaintiffs and defendants 1 to 11 submitted for the consideration of the arbitrators. For example the extent of the impracticability of the alienation in his favour will depend upon whether the adoption in dispute was really made or not and some of the other questions covered by the issues which the arbitrators were called upon to try also relate to matters in which the 23rd defendant was to some extent interested. Therefore this is not a case in which the subject-matter of the reference was one in which the 23rd defendant had no interest. It follows that the 23rd defendant was a person interested in the whole suit as

1. (1912) 14 I. C. 562. 2. (1917) 27 C. L. J. 389.
3. (1916) 25 C. L. J. 339.

Palita Pavana Panda *v.* Narasinga Panda

well as in the particular subject-matter of the reference and that as he was not a party to the reference, the order referring the matter to the arbitrators was *ultra vires* and without jurisdiction. In this view all subsequent proceedings must be regarded as infructuous and must be set aside. The decree of the lower court must be reversed and the Subordinate Judge must be directed to deal with the suit on the merits. Costs will abide the result.

A. S. V.

PRIVY COUNCIL.

PRESENT :—LORD PHILLIMORE, SIR JOHN EDGE, AND SIR LAWRENCE JENKINS.

[On Appeal from the High Court of Judicature at Madras.]

P. C.

Maharaja of Jeypore *v.* Sri Rukmini Pattamahadevi Garu.

Sri Sri Sri Vikrama Deo Maharajulum Garu, Maharaja of Jeypore. ... *Appellant.* *

v.

Sri Rukmini Pattamahadevi Garu ... *Respondent.*

Landlord and tenant—Forfeiture—Denial of landlord's title—Refusal to perform service—Breach of ceremonial observance.

The repudiation of a landlord's title by the tenant will in certain circumstances work a forfeiture. This is not the ancient Indian Law, but has been adopted by the Courts from the law of England, and is now embodied in the Transfer of Property Act, 1882, S. 3 of which merely gives statutory form to a rule already in force.

The denial which operates a forfeiture must now be by matter of record before institution of any suit for forfeiture, and must be in clear and unmistakable terms.

Semble, that the breach of ceremonial observance prescribed in a grant is not now a cause of forfeiture or resumption, at any rate where the grantor is a subject, and not the Government.

A pargana within appellant's zemindari was held under a patta which provided that the holder should pay a rent of Rs 15,000 and attend the Zemindar at the Dassara Durbar with 500 paiks for service The holder in 1904 refused in writing to pay rent of Rs. 15,000 or to attend at the Durbar, and alleged that the pargana was an independent zemindari, subject only to a rent of Rs. 2,200.

Held, that no forfeiture was incurred, as there was no denial of title by matter of record before suit instituted, and the service refused was a subsidiary consideration and of no substantial benefit to the landlord.

Appeal and cross-appeal from a decree of the Madras High Court, dated February 18, 1915, modifying a decree of the Court of the Agent to the Governor of Madras. (October, 21-1910.)

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* P. C. A. Nos. 125 and 126 of 1916. 4th, 5th and 22nd November, 1918.

P. C.
Maharaja of Jeypore v. Sri Rukmini Pattamahadevi Garu.

The facts of the case are sufficiently stated in their Lordships' judgment. The appellant Maharaja sued under a patta of 1st August 1887, and to prove his right of forfeiture relied particularly upon a letter of November 26, 1904, from defendant's muktyar. The defendant in his written statement pleaded that the pargana was an independent zemindari, subject only to a fixed rent (Kattubadi) of Rs. 2,200 and held under a copper-plate of 1689. He also submitted that he had anyhow made no such disclaimer of plaintiff's title as to operate a forfeiture.

The Agent to the Governor accepted the copper-plate story and therefore decreed the suit only at Rs. 2,200 as admitted.

On appeal the High Court (Oldfield and Sankaran Nair, JJ.,) found the copper plate to be spurious and the true terms of the tenure to be as alleged by plaintiff. They therefore awarded plaintiff rent at Rs. 15,000 but they disallowed his claim for resumption. As to this Oldfield, J., (with whose judgment Sankaran Nair, J., agreed) observed.

"His remaining claim, to resume defendant's estate, must be dealt with on consideration of the service character of its tenure. For it is not suggested that defendant would not be entitled to relief against the forfeiture incurred in respect of his default in payment of rent; and his description of his holding as independent and permanent at a fixed rent in Exhibit BB is not such a repudiation of his landlord's title as would entitle plaintiff to relief. *Kali Krishen Tagore* v. *Golam Ali* [1], *Kali Krishna Tagore* v. *Golam Ali* [2] and *Unhamma Devi* v. *Vaikunta Hegde* [3]. Detailed reference to the evidence as to service has hitherto been postponed for the sake of clearness, and we now refer shortly to the law before dealing with it. Numerous authorities have been cited. But it is useless to refer to cases such as *Raja Venkatarangayya* v. *Appalarazu* [4] and *Parthasarathi Apparao* v. *Secretary of State for India* [5] in which the claim to resume was made by Government, not the Zemindar, when the material principles really lie in a small compass and can be gathered directly from two decisions, one of them recent, those of the Privy Council in *Forbes* v. *Meer Mahomed Tuquee* [6] *Sri Rajah Sobhanadri Appa Rao* v. *Sri Rajah Venkatanarasimha* [7] and *Venkatanarasimha Apparao* v. *Sobanadhri Apparao* [8] and the first condition, on which they contemplate resumption as permissible, is that the estate shall have been included in the assets of the Zemindari, on which the permanent settlement was made; our finding of fact already reached entails that this condition is complied with, and it is unnecessary for

1. (1893) I. L. R. 13 Cal. 3.
2. (1885) I. L. R. 13 Cal. 248.
3. (1893) I. L. R 17 Mad. 218.
4. (1910) 20 M. L. J. 728.
5. (1913) 26 Mad. L. J. 39.
6. (1870) 13 M. I. A. 438.
7. (1902) I. L. R 26 Mad. 403.
8. (1905) I. L. R. 29 Mad. 52.

P. C.

Maharaja of Jeypore v. Sri Rukmini Pattamaha devi Garu.

us to found our conclusion on the presumption, based on the nature of the service, regarding which argument was offered. The next condition is that either the grant is for service in lieu of wages, in which case the grantor's right to resume is absolute, or that, if the grant is of an estate burdened with service, the grantee, even if that service is obsolete, or unnecessary, is unwilling or unable to perform it. In the present case however it is in fact unnecessary to enquire which of these descriptions is applicable to the grant, because in his letter, Exhibit BB, defendant denied his obligation to render service and impliedly refused to perform any; and such enquiry would moreover be meaningless, because both descriptions assume that an enforceable obligation for service is in question, and we shall hold in accordance with defendant's contention that none is established. In the circumstances, we do not consider at length how far the tenure of Bissemkatak possesses the characteristics of a grant subject to a burden of service, enumerated by this Court in the portion of its judgment in *Sobanadari Apparao* v. *Venkatanarasimha Appa Rau* (1) which the Privy Council adopted. For only the presence of the second, fixity of tenure, could be discussed. As to it a finding in the negative would follow from our conclusion that the rent was enhanced on three occasions.

"The lower Court's findings are that the nature of the service up to 1863 was uncertain and that after that year it was rendered as matter of courtesy. It did not decide, as we are asked to do, whether anything, which can be described as service, is exigible from defendant at all. His obligation is described in Exhibit HHH, as attendance (1) with 500 paiks at Dusserah, the occasion of the annual festival and Durbar; and (2) whenever such attendance is directed, when the Thatraz goes on Sircar business. The question is whether this description, read in the light of history or as it stands, involves anything enforceable as a condition of the holding.

* * * * *

"The second condition, attendance when on Sircar business, is so indefinite as to be unenforceable; and we refer to it no further. It is accordingly on the character of attendance at Dusserah, as an enforceable condition of the tenure, that plaintiff's case depends. We do not think that attendance on ceremonial occasions is such a condition. No witness who spoke to the course of the Durbar, which is held, described anything beyond the compliments usually paid by an inferior to a superior as passing; and we have been referred to no authority dealing with a claim to resumption, in which an obligation merely to be present, even accompanied by a retinue, was regarded as sufficient. In every case the service consisted in the doing of some act for the benefit

1. (1902) I. L. R. 26 Mad 403.

P. C.

Maharaja of Jeypore v Sri Rukmini Pattamahadevi Garu.

of the grantor; and we have been shown no reason why less should be required to prove the service character of the tenure here. Defendant's duty is at most analogous to that of English copy-holders to do suit in the Court of their manor; and default in it will not entail termination of the holding: Halsbury's Laws of England, Vol VIII, page 14."

The learned Judge proceeded to find that an alleged duty of guarding the idol by the Paiks was not proved: and that mere attendance with them was not a service, default in which would justify resumption.

Sankaran Nair, J., added: "It was then argued that according to the terms of the patta, the defendant is bound to render service and as he has failed to do so, the Plaintiff is entitled to recover possession. Assuming the defendant is bound to render service under the agreement of 1877, there is nothing to show that the defendant forfeited the Raj on default to render the same. The patta does not make it a condition. Considering that the chief of Bissemkatak was a ruler and a landed proprietor who held lands brought by him under cultivation, very strong evidence is required to prove any condition of forfeiture as alleged by appellant. The nature of the so-called service places the matter beyond doubt. The alleged service is said to be attendance at the Dusserah festival and for certain other ceremonial purposes. Besides being indefinite this is not service. It is only a mark of respect which every person, even an official is expected to pay and pays to his superior. I agree with what my learned brother has said on this question."

Hence this appeal.

Upjohn, K. C., De Gruyther, K. C. and Kenworthy Brown for Appellant: Under the patta of 1877 the defendant had got to render these services: he refused to render them, and wilfully repudiated the tenure.

(*Lord Phillimore*: You say he deliberately flew in the face of his feudal superior)

Yes; and that all over the world is a ground for resumption. The relation of landlord and tenant all over the world involves fealty-fidelity; this the High Court have overlooked. That wilful failure to render such services is in India, as elsewhere, a ground of forfeiture has long since been recognised by this Board; *Forbes* v. *Meer Mahomed Tuquee.* [1] Secondly, both by his letter of November 26, 1904 and by

1. (1870) 13 Moo. I. A. 438, 466

his written statement, defendant denied his landlord's title and set up an independent title: consequently appellant, having given due notice of his intention to resume possession, is entitled to a decree in ejectment. *Doe* v.*Stanion* [1], *Vivian* v. *Moat* [2], *Padmanabhayya* v. *Ranga* [3], *Transfer of Property Act*, 1882, *S.* 111 (*g*).

P. C.
Maharaja of Jeypore
v.
Sri Rukmini Pattamahadevi Garu.

Dunne, K. C. and Dube for respondent : The patta which governs the rights of the parties was earlier than 1882 : hence by S. 2 (c) the Transfer of Property Act 1882 does not apply. Even if S. 111 (g) applied no forfeiture arose. The matter must be decided by "justice, equity and good conscience" *i. e.*, by English law as applicable to India: *Sutyabhama Dasee* v. *Krishna Chunder Chatterjee* [4], *Debiruddi* v. *Abdur Rahim* [5], *Kali Das Aihri* v. *Monmohini Dasi* [6], *Nizamuddin* v. *Mamtazuddin* [7], *Waghela Rajsanji* v. *Masludin* [8].

Denial of title in English law causes a forfeiture only if made before suit by matter of record or in certain cases, not now material, in pais. Cruse's Digest, lit. 3 Ch. 1, S. 38. Woodfall's Landlord and Tenant, Ch. 8, S. 5 (19th edn., p. 363).

(Sir Lawrence Jenkins referred to Platt on Leases, Part 7, Ch. 1, S. 2, *Sheikh Miadhar* v. *RajaniKanta Roy* [9]).

The rules laid down in *Doe* v. *Stanion* [1] and *Vivian* v. *Moot* [2] do not apply in India. *Kali Kishen Tagore* v. *Golam Ali* [10].

Forfeiture by denial of title, unless it be by matter of record, is obsolete even in England. In any case defendant never denied he was appellant's tenant, for he admitted his liability to pay rent: all he disputed was the terms of the tenancy.

The refusal to perform the services was not a ground of forfeiture. The patta has no re-entry clause. This is not the case of a purely service tenure, the main consideration was the rent, and the services were quite subsidiary and moreover, even if not obsolete, were of a ceremonial character. In these circumstances no right to resume arose merely because they were not in fact performed; *Forbes* v. *Meer-Mahomed Taquee* (supra). There is no case in which failure to render service of this kind has been held to work a forfeiture.

De Gruyther, K.C. replied.

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1 (1836) 1 M. and W. 695.
2. (1881) 16 Ch. D. 730.
3. (1910) I. L. R. 34 Mad. 161=20 M. L. J. 930.
4. (1880) I. L. R. 6 Cal. 55
5. (1888) I. L R. 17 Cal 196.
6. (1897) I. L. R 24 Cal. 440.
7. (1900) I. L. R. 28 Cal. 135.
8. (1887) I. L. R. 14 I. A 89, 96.
9. (1909) 14 C. W. N. 319.
10. (1886) I L. R. 13 Cal. 3 ; 248.

P. C.

Maharaja of Jeypore v. Sri Rukmini Pattamahadevi Garu.

Lord Phillimore.

Their Lordships' judgment was delivered (January 20, 1919) by

Lord Phillimore :—This is an appeal from a decision of the High Court of Judicature at Madras which varied a decree of the Court of the Agent to the Governor of Madras.

The suit was brought by the present appellant against the husband of the present respondent for possession of the pargana of Bissemkatak, and for arrears of rent and mesne profits.

The case made in the plaint filed on 17th September, 1906, was that Bissemkatak was in the plaintiff's Zemindari, that under various grants or leases it had been held by the ancestors of the defendant paying rent and rendering services to the ancestors of the plaintiff, and that at the present time the governing instrument was a patta of the 1st August, 1877, under which the then Maharajah continued the father of the defendant in possession of the pargana on his payment of an annual Kattubadi of Rs. 15,000. The further contents of the patta were stated as follows :—

"Just as your father used to attend in Dassera for service, so, now you should also present yourself with 500 paiks for service whenever directed to do so. These directions are given imperatively."

The plaint proceeded to aver that the defendant had been directed in 1903 to render services by attending the ensuing Dassera Durbar, at Jeypore, that he did not attend the Dassera, or remit the Kattubadi that year or in 1904, but had replied to the effect that Bissemkatak pargana was not held on service tenure, but that it was an independent Zemindari, which had only to pay to the Zemindar of Jeypore a fixed, unchanging and unchangeable Kattubadi of Rs. 2,200 as per permanent settlement records, and had remitted therewith Rs. 3,300 only ; that he had been warned of the consequences of his conduct and given an opportunity for withdrawing his repudiation, but that he persisted in repudiating the plaintiff's title to the pargana and in denying his liability as service holder under the plaintiff, and also in setting up a title in himself to the pargana as an independent Zemindar subject only to the payment to the plaintiff of a fixed, unchanging and unchangeable Kattubadi of Rs. 2,200 annually.

The plaintiff thereupon contended that the pargana was held either on service tenure by the defendant merely as a

P. C.

Maharaja of Jeypore v. Sri Rukmini Pattamahadevi Garu.

Lord Phillimore.

remuneration for discharging the services annexed to the said office, or on a tenure subject to the condition and burden of rendering such service to the Zamindar ; that in the former case it was competent to the plaintiff to dispense with such services and to resume the pargana at pleasure, and that in either case the defendant was liable to forfeit the pargana by reason of his repudiating the plaintiff's title and his (defendant's) liability to render such services and to pay the Kattubadi of Rs. 15,000 and of his refusing to perform such services.

The defendant by his written statement said that the estate of Bissemkatak was an independent estate at first, but became subordinate to the Jeypore Zamindri, that the owner of Bissemkatak, whom he styled Zamindar, did not hold his estate on condition of rendering any service to the Maharajah, and that at any rate, some time before 1689, he agreed to pay a fixed rent to the Maharajah and thereupon any duty to render service ceased. And he set up a patta supposed to be engraved on a copper plate whereby the Maharajah acknowledged the permanent and hereditary freehold right of the Bissemkatak Zamindar, fixing the Jamabandi or rent at Rs. 2,200. He further said that the Bissemkatak estate had no connection with Jeypore, nor was it subordinate to it, except in the manner mentioned above. He admitted that he had repudiated the claims made by the Maharajah in his letters of summons as to the tenure on which his estate was held, and he denied the various allegations made in the plaint, both in respect of the nature of his tenure, and of the plaintiff's right to resume. He gave reasons why even if the obligation to render services was not put an end to by the fixing of a Jamabandi in lieu in 1689, the liability to render them had at any rate now ceased. And finally he submitted that in the circumstances of the case he had made no disclaimer, or denial in law, of the plaintiff's title such as to work a forfeiture of the estate.

The first question, therefore, to be determined was that of the tenure by which the defendant held his estate. His father had unquestionably accepted the patta of 1877 ; but if the defendant could establish the copper plate of 1689, he might then be able to free himself from the effect of the patta of 1877. There would still be a good many difficulties in his way, but in their Lordships' opinion it is unnecessary to discuss them. At the

P. C.

Maharaja of Jeypore v Sri Rukmini Pattamahadevi Garu

Lord Phillimore.

root of the defendant's case lay the question of the genuineness of the copper plate.

The Agent in the Court of first instance accepted it as genuine; the High Court took the opposite view.

After hearing all that could be said upon the subject by counsel for the respondent, who was in this respect a cross-appellant attacking the decree of High Court, their Lordships think that the decision of that Court is right, and they concur in the reasons given by Oldfield, J.

The ancestors of the defendant were no doubt from time to time, as far back as it can be traced, in occupation of Bissemkatak. They were excluded by the then Maharajah from possession about 1816 and remained out of possession till somewhere about the year 1850, or it may be 1853, when a lease was granted at the rent (said to be a reduced rent) of Rs. 1,500.

In October, 1853, occurs the first mention of the alleged copper plate, but it was probably not produced to anyone in authority. At that time and since the rent supposed to be reserved according to the copper plate was stated to be Rs. 2,200, but in 1902 to be Rs. 2,500.

The story told on behalf of the defendant was that some representative of the then owner took it to the Government agent in 1853 or 1854, and then instead of bringing it back to his master kept it, because he had a quarrel with his master; that it remained in his house for many years till there was a threat that some Government official was going to search the house in connection with some charge of malversation, whereupon the defaulting servant took the copper plate to the brother of the widow of the last owner, who gave it to the widow, who gave it to a Government agent in the year 1891. The document, therefore, according to this story, was out of proper custody from 1854 to 1891.

No doubt, in 1891, the copper plate which was produced at the trial, and which was relied upon by the defendant, was produced and handed to the Government agent, since when its possession is accounted for.

But the whole story is a most improbable one, and against it are the unquestioned facts that in 1845 and 1846, during the

P. C.

Maharaja of Jeypore v. Sri Rukmini Patta-mahadevi Garu.

Lord Phillimore.

time when the defendant's ancestors were out of possession, two suits were brought against the Maharajah to recover possession and discontinued ; that when the defendant's ancestor was restored to possession it was on a reduced rent of Rs. 1,500, but with the condition of rendering service ; that in 1854 a new lease at Rs. 2,500, and in 1864 a further lease at the increased rent of Rs. 5,000, always with the condition of service, and finally in 1867 the patta or lease already referred to were given and accepted—a state of things entirely inconsistent with the suppposed existence of a permanent tenure at a fixed rent of Rs. 2,200 without any duty to render service.

In their Lordships' opinion the genuineness of the copper plate of 1689 was not proved, and there is no reason for saying that the patta of 1877 was invalid ; and the relations between the parties must be held to be governed by the terms of this patta.

The cross appeal of the respondents, therefore, fails.

Their Lordships have now to deal with the principal appeal.

The High Court, while reversing the decision of the Agent and making a decree in favour of the appellant, has granted him relief to a limited extent only. It ordered and decreed that the respondent, who had by that time succeeded to the estate of the deceased defendant, should pay with interest the arrears of rent at the rate prescribed by the patta, but it did not give to the appellant possession of the property, holding that no forfeiture had been established.

In their Lordships' opinion it is a consequence of the decision of the High Court that the respondent holds a tenure derived from the Zamindari of the Maharajah, and there is an obligation upon the tenant for the time being to pay the rent, and so far as modern conditions of society and law permit, to render the service prescribed by the patta.

So far they accede to the contentions of the appellant. They have now to enquire whether in these circumstances the acts and omissions of the deceased defendant were such as to create a forfeiture of his estate.

The case for the appellant is put in paragraph 31 of his plaint:—

"Whether the Pargana was held on service tenure by the Defendant merely as remuneration for discharging the services annexed to the said office or on a

P. C.

Maharaja of Jeypore v. Sri Rukmini Pattamahadevi Garu.

Lord Phillimore.

tenure subject to the condition and burden of rendering such service to the Zamindar, it is competent to the plaintiff in the former case to dispense with such services and to resume the Pargana at pleasure, and in either case the Defendant is liable to forfeit the Pargana by repudiating the Plaintiff's title and his (Defendant's) liability to render such services and to pay the Kattubadi of Rs. 15,000 and by refusing to perform such services, and it is competent to the Plaintiff to enforce such forfeiture as he has done by his notice, dated 24th April 1906, and resume the possession and management of the Pargana.

He thus raises two grounds of forfeiture ; the second, which their Lordships propose to take first, being that the tenant has repudiated his landlord's title ; and it must be accepted that it is the law of India that there are circumstances in which such a repudiation will work a forfeiture. This law is not ancient Indian law, but has been adopted by the Courts from the law of England, and is now embodied in a statute.

By the Transfer of Property Act, 1882—

"Section 111. A lease of immoveable property determines :—

* * * * * *

"(g) By forfeiture ; that is to say (1) in case the lessee breaks an express condition which provides that, on breach thereof, the lessor may re-enter, or the lease shall become void ; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself ; and in either case the lessor or his transferee does some act showing his intention to determine the lease."

This statutory provision not being retrospective (see S. 2) does not govern the present case. But it is in substance the placing in a statutory from of the rule of law which had been already adopted by the Courts in India. (See *Kally Dass Ahiri* v. *Monmohini Dassee*) 1.

They are directed by the several charters to proceed where the law is silent, in accordance with justice, equity, and good conscience, and the rules of English law as to forfeiture of tenancy may be held, and have been held, to be consonant with these principles and to be applicable to India. (See *Nizamuddin* v. *Mamtozuddin*. 2

Now the rule of English law is that a tenant will forfeit his holding if he denies his landlord's title in clear, unmistakable terms, whether by matter of record, or by certain matters *in pais*.

The qualification that the denial must be in clear and unmistakable terms has not unfrequently been applied by the Courts in India, which have held that where a tenant admits

1. (1897) I. L. R., 24 Cal. 440. 2. (1900) I. L. R., 28 Cal. at p. 185.

P. C.

Maharaja of Jeypore v. Sri Rukmini Patta-mahadevi Garu.

Lord Phillimore.

that he does hold as a tenant of the person who claims to be his landlord, but disputes the terms of the tenancy, and sets up terms more favourable to himself, he does not, though he fails in establishing a more favourable tenancy, so far deny the landlord's title as to work a forfeiture. (See *Vithu* v. *Dhondi*, [1] *Venkaji Khrisna Nadkarni* v. *Lakshman Devji Kandar*,[2] *Unhamma Devi* v. *Vaikunta Hegde*, [3] *Chinna Narayudu* v. *Harischendana Deo* [4]).

Counsel for the respondent contended that she was entitled to the benefit of these rulings, and that in this case there was no such clear and unmistakable denial.

Whether this be so or not, their Lordships do not find it necessary to decide for the following reasons :—

(1) There is here no denial by matter of record before the present suit was instituted. Denial in the suit will not work a forfeiture of which advantage can be taken in that suit, because the forfeiture must have accrued before the suit was instituted (See *Nizamuddin* v. *Mamtozuddin* [5] already referred to, and the previous case of *Pranath Shaha* v. *Madhu Khula*, [6] there cited).

(2) As to forfeiture by matter *in pais*, this, according to English law, occurred when the tenant purported to make a tortious conveyance such as a feoffment with livery of seisin, the result of which was to purport to give to the feoffee a greater estate than he himself had in the land ; in such case the estate thus given, though forfeitable immediately to the person claiming by a prior title, was good against everyone else. The feoffment was then said to operate by tort.

When by the Real Property Act (8 and 9 Vict., C. 106, S. 4), it was provided that no feoffment should have in future any tortious operation, the reason for imposing a forfeiture ceased.

It never was applicable in India, and their Lordships can find no authority for saying that an "innocent conveyance," ever operated in England as a cause of forfeiture, or that it has ever been held so to operate in India.

The English law on this subject is conveniently to be found in Bacon's Abridgment, "Leases," T2, and Platt on Leases, Part 7, Ch. I, S. 2.

1. (1890) 15 Bom. 407.
2. (1895) I L.R. 20 Bom. at p. 354.
3. (1893) I L R. 17 Mad. 218.
4. (1903) I L.R. 27 Mad. 23.
5. (1900) I. L. R. 28 C 135.
6. (1886) I. L. R 13 Cal. 96.

P. C.

Maharaja of Jeypore v Sri Rukmini Pattamahadevi Garu.

Lord Phillimore

Some confusion has arisen from a misunderstanding of the reason why a tenant from year to year may, when he has denied his landlord's title, be ejected without notice. (*Doe d. Gray* v. *Stanion*, [1] *Vivian* v. *Moat*. [2]

The reason is explained in *Doe d Graves* v. *Wells*, 10 A. & E. 427, and in Platt on Leases.

It is not because the denial or disclaimer works a forfeiture.

Platt expresses it thus :—

" The holding being from year to year subject to the mutual will of landlord and tenant to determine it on giving the usual 6 months' notice, evidence of a disclaimer . . . is evidence of an election to put an end to the tenancy and supersede the necessity for such notice. . . . Hence verbal or written denials of a tenancy have rendered a notice to quit unnecessary, but it does not appear that they have effected a forfeiture of the term."

That a tenant who disputes his character as tenant does not thereby forfeit a lease for a term certain is shown by *Deo d. Graves* v. *Wells.*

The doctrine of *Vivian* v. *Moat* does not apply to Indian tenures such as the present (See *Kali Kishen Tagore* v. *Golam Ali*, [3] and *Vithu* v. *Dhondi* [4] already cited.)

This being so there was in the present case no such renunciation by the tenant of his character as such as to work a forfeiture.

Their Lordships have gone at some length into this point, because it was argued with much learning and insistence at their Lordships' Bar ; but it is difficult to find any trace in the judgment of the High Court of its having been made a serious matter of discussion there.

It was no doubt raised slightly but sufficiently in paras. 62 63, 64 and 73 of the Memorandum of Appeal to the High Court ; but the written judgment of the learned Judges seems to deal with the other ground of forfeiture only.

This their Lordships must now approach. It has been described at their Lordships' Bar as the contumacious refusal of the defendant to render the services prescribed by the patta.

After two or more formal demands requiring the defendant's attendance at the Durbar and his payment of the rent due,

1. (1836) 1 M. & W. 695.
2. (1881) 16 Ch. D. 780.
3. (1886) I.L.R. 13, Cal. p. 3 and p 248.
4. (1890) I.L.R. 15 Bom. 407.

P. C.

Maharaja of Jeypore v. Sri Rukmini Patta-mahadevi Garu.

Lord Phillimore

the agent and Muktyar of the defendant wrote to the Maharajah on the 26th November, 1904, the following letter :—

"MAHARAJAH,—

"I am in due receipt of your so called Hukums Nos. 818 and 688 of the 4th October, 1904, calling on me to attend your Dassera Durbar of this year with 500 Paiks and Rs. 15,000 (fifteen thousand) on account of what you call Talapu Dewani Kattubadi of Fasli 1313 and Rs. 7,500 (seven thousand five hundred) for the first half-year of Fasli 1314.

"2. The Bissemkatak Estate is not held on service tenure as you seem to imply. It is an independent Zamindari which has only to pay the Jeypore Zemindari a fixed, unchanging and unchangeable Kattubadi of Rs. 2,200 (two thousand two hundred) as per Permanent Settlement Records.

"3. I have, therefore, remitted Rs. 2,200 (Rupees two thousand and two hundred) on account of Kattubadi for Fasli 1313 and Rs. 1,100 (one thousand and one hundred) for the 1st and 2nd instalments of the present Fasli 1314, which, I request you will be pleased to accept and formally acknowledge."

Thereafter, though warned of the consequences of his refusal, the defendant persisted in his non-compliance.

The Judges of the High Court came to the conclusion that the second condition of attendance, when on Sircar business, was so indefinite as to be unenforceable, and that the first condition, now that there was no longer any question of military service, was merely one of an attendance on ceremonial occasions, which was not service but complimentary only, or a mark of respect which every person, even an official, is expected to pay to his superiors. And they said that there was no authority for holding that failure in this respect would lead to forfeiture, or to a liability to resumption.

At their Lordships' Bar the point was made that there was no proviso for re-entry upon breach contained in the patta, and reliance was placed upon *Forbes* v. *Meer Mohammed Tuqee* [1]. This case, however, was not one of contumacious refusal to render a possible service ; it was a case where, owing to altered conditions of society, the prescribed services could no longer be rendered, and where the superior landlord sought thereupon to resume the tenancy, and in the opinion of their Lordships failed.

There are, however, expressions in their Lordships' judgment in that case which are of some assistance to the respondent, and no authority of weight was produced for rendering the breach of such a ceremonial observance a cause

1. (1870) 13 M I A 438

P.C.

Maharaja of Jeypore v. Sri Rukmini Pattamahadevi Garu.

Lord Phillimore.

of forfeiture or resumption, at any rate where the superior landlord was a subject, and not the Government.

It may be said that in this case the rent reserved is the principal matter, and that the rest is only subsidiary.

It may also be observed that under modern conditions it is doubtful whether a strict compliance *modo et forma*, with the provisions of the patta, would not be of public inconvenience and perhaps forbidden by superior authority. Modern conditions also make the service suggested highly burdensome and without any corresponding benefit to the superior.

Having all these considerations in mind their Lordships agree with the judgment of the High Court, that the refusal to render these services did not operate to create a forfeiture or give occasion for resumption.

At the same time their Lordships must not be held to approve of the total failure to render ceremonial respect to the Maharajah, still less of the language in which the refusal was couched; and they must not be taken as deciding that there is no method by which an absolute and blank refusal might not incur some appropriate penalty, and they hope that these observations will lead the parties to make some sensible arrangement in future.

When both landlord and tenant were minors, a sum of money appears to have been publicly paid at the Durbar in lieu of service. Whether this course should be taken, or the attendance of the tenant with a small retinue at the Durbar should be deemed appropriate and sufficient, must be left for the present to the good sense of the parties.

Their Lordships, however, think that the appellant is entitled to have his position as superior put in a clearer light than it was put in the formal decree of the High Court, and that the order and decree that the respondent should pay, should be prefaced by the words: "This Court being of opinion that the defendant held, and the respondent holds, a tenure under the appellant."

Subject to this variation the appeal fails. But seeing that there has been this slight success, and that the cross-appeal has failed, their Lordships think that justice will be met by leaving the decision of the High Court as to costs as it stands, and by giving no costs of this appeal.

P. C.

Maharaja of Jeypore *v.* Sri Rukmini Patta mahadevi Garu.

Lord Phillimore.

Their Lordships will, therefore, humbly recommend His Majesty that the decree of the High Court be subject to the variation above mentioned, affirmed; and that the cross appeal be dismissed, and that the parties should respectively pay their own costs of the appeals to His Majesty in Council.

Solicitors for Appellant:—*T. L. Wilson & Co.*

Solicitors for Respondent;—*Douglas Grant.*

A. P. P.

PRIVY COUNCIL.

PRESENT: LORD BUCKMASTER, LORD DUNEDIN, SIR JOHN EDGE AND SIR LAWRENCE JENKINS.

[On Appeal from the High Court of Judicature at Fort William, Bengal.]

Hukum Chand Boid ... *Appellant.**

v.

Pirthichand Lal Chowdhury ... *Respondent.*

P. C.

Hukum Chand Boid *v.* Pirthichand Lal Chowdhury.

Limitation—Patni Taluq—Sale for arrears of rent—Reversal of Sale—Decree reversing sale—Whether its operation is suspended by an appeal—Remedies of purchaser at patni sale whose sale is set aside—Is the remedy provided by S. 14 of the Patni Regulation exclusive—Bengal Patni Taluqs Regulation (Regulation VIII of 1819) *Ss.* 14, 15—*Indian Limitation Act,* 1877 (*Act XV of* 1877) *Sched II. Arts.* 62, 97.

A patni taluq was sold for arrears of rent under Bengal Regulation VIII of 1819. The sale was reversed under S. 14 of the Regulation on August 24, 1905: the decree reversing it was affirmed on appeal on August 3, 1906. The purchaser was a party to the proceedings but was awarded no indemnity under S 14. The purchaser remained in possession till August 28, 1906. On September 14, 1908, he sued the zemindar (who had brought the taluk to sale) to recover (inter alia) so much of the purchase money as the zemindar had received.

Held: (assuming, but not holding, that the suit was competent and that it was one "for money paid upon an existing consideration which afterwards fails") that time ran from August 24, 1905, and that the suit was barred by the Indian Limitation Act, 1877, Sched. II Art. 97.

Semble, that such a suit would really fall under Art. 62.

Under the Indian Law and procedure an original decree is not suspended by presentation of an appeal nor is its operation interrupted where the decree on appeal is one of dismissal.

S. 14 of the Bengal Patni Taluqs Regulation (Regulation VIII of 1819) imposed on the Court, in a suit against the Zemindar for the reversal of a sale under the Regulation, the imperative duty of indemnifying the purchaser against loss. To discharge this duty a distinct issue should be framed as between the purchaser and the person chargeable under the section whether, in case the sale is reversed, the purchaser has suffered any and what loss against which he ought to be indemnified by that person.

Quaere, whether the remedy provided by S. 14 in a purchaser's favour does not exclude all other remedies even apart from any determination of such an issue.

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* October 24, 1918.

P. C.

Hukum Chand Boid v. Pirthichand Lal Chowdhury.

Appeal from a decree of the Calcutta High Court, dated July 9, 1914, affirming a decree of the Subordinate Judge of Purneah.

The facts are sufficiently stated in their Lordships' judgment. The trial Judge held that the plaintiff Hukum Chand Boid, had purchased benami for the patnidar: that the suit fell under Art. 97 of Schedule II of the Limitation Act: that time began to run from August 24, 1905, the date of the original decree reversing the sale: and that the suit was time barred. He accordingly dismissed it.

On appeal Fletcher and Richardson, JJ, reversed the finding that plaintiff was a benamidar, but expressed a doubt whether the suit lay, having regard to S. 14 of the Regulation. Upon the question of limitation they held that the suit was barred by Art. 97, except as to two items, for rent paid to the Zemindar after the sale and interest thereon: as to these they held there had been no failure of consideration. They therefore affirmed the Lower Court's decree dismissing the suit.

Hence this appeal.

P. O. Lawrence, K. C. and *E. B. Raikes*, for appellant.

De Gruyther, K. C. and *Dunne, K. C.*, for respondent.

P. O. Lawrence, K. C., for appellant, submitted that the suit was not barred by limitation. Time did not begin to run till August 28, 1906; it was only then—when plaintiff gave up possession—that his consideration failed. *Hanuman Kamut* v. *Hanuman Mandar* [1] *Narsing Shiobakas* v. *Pachu Rambakas* [2]. In the latter case Beaman, J, (at p. 541) pointed out that it was only when the promisee was deprived of possession that he had any ground for complaint.

When we bought, we got title and possession. Mere depriving us of title did not take away all the consideration. Mere judgment is not enough: they may never take out execution. Failure of consideration is when I lose every benefit I have contracted for.

(*Lord Dunedin* referred to Sir Richard Couch's judgment in *Hanuman Kamut* v. *Hanuman Mandar*, [1] laying down that "the consideration did not fail at once, but only from the time when the appellant—found himself unable to obtain possession"—p. 164).

That case strongly supports me: it is the converse of this; it was the purchaser failing to obtain possession.

Until my client not only lost possession, but was compelled to disgorge the rents and profits, could he say the consideration had wholly failed? He had in fact obtained large sums under the contract

1. (1891) L. R. 18 I. A. 158=19 Cal. 123. 2. (1913) I. L. R. 37 B. 538.

P. C.

Hukum Chand Boid v. Pirthichand Lal Chowdhury.

With regard to the rent, the sale being set aside the Zemindar was not entitled to it: the High Court, in finding as to this that there was no failure of consideration, overlooked that under the decree setting aside the sale we had to pay mesne profits to the durpatnidars.

If it be held time ran from the setting aside of the sale, it ran from August 3, 1906, the date of the High Court's decree on appeal: *Venkatanarasinhulu* v. *Peramma* [1].

Plaintiff's ordinary right of action is not taken away by the provisions of S. 14 of Bengal Regulation VIII of 1819 giving him a special remedy: the special remedy is not exclusive: *Radha Madhav Samanta* v. *Sasti Ram Sen* [2].

The Subordinate Judge, in the absence of a finding that the purchase money was paid by the patnidar, should not have held that plaintiff was a benamidar: *Faek Baksh* v. *Fukeeroodeen* [3].

De Gruyther, K. C., for respondent: Assuming the suit lay at all; it was barred by Art. 97. There is no question of time running from the relinquishment of possession; the Zemindar in the case of a patni taluk has no right to possession or in ejectment; it is a case of receiving rents. If there was any right of action against the zemindar it arose on August 25, 1905, when the sale was set aside: the suit could have been brought notwithstanding that the decree was under appeal. But in fact there was no privity of contract between the zemindar and the purchaser; it is not the zemindar, but the Collector, who sells under the Regulation: it is precisely because the purchaser has no remedy by action that S. 14 gives him a remedy in the suit for reversal. Further, upon the appeal to the High Court from the decree under S. 14 plaintiff could and should have asked for an indemnity: not having done so he is barred by *res judicata*.

If there was any cause of action for the rent paid after the decree it was against the patnidar: but anyhow such a cause of action is time-barred.

Upon the facts the Subordinate Judge has rightly found that plaintiff was benamidar for the patnidar, and on that ground alone his whole claim fails.

P. O. Lawrence, K. C., in reply. The Regulation treats a sale under it as one by the zemindar. The sale of a patni taluq under the Regulation has no analogy to a sale for arrears of revenue; *Sheoruttun Singh* v. *Net Loll Sahu.* (4) The true analogy is to a sale by a trustee under a power of sale.

1. (1894) I. L. R. 18 Mad 173.
2. I. L. R. (1899) 26 Cal. 826.
3. (1871) I. L. R. 14 Moore, I. A 234.
4. (1902) I.L.R. 30 Cal. 1, 11, 12.

P. C.

Hukum Chand Boid v. Pirthichand Lal Chowdhury.

Sir Lawrence Jenkins.

Their Lordships' judgment was delivered (Dec. 3, 1918) by

Sir Lawrence Jenkins:—On the 14th May, 1904, a Patni Taluk known as Lot Mirzapur was put up for sale for arrears of rent under the Bengal Patni Taluks Regulation, 1819 at the intance of the zemindar, Mussumat Bhagwanbati Chowdurain. The defendant-respondent, Pirthichand Lal Chowdhury as her successor-in-title, is the present Zemindar. The defaulting patnidar was Chhatrapat Singh. Hukumchand Boid, now represented on this appeal by his heirs, the plaintiffs-appellants, was the highest bidder, and the tenure was knocked down to him.

The purchaser paid in the entire amount of the purchase money, and on the 23rd of May, 1904, he received from the officer conducting the sale a certificate of payment under S. 15 of the Regulation.

On the 28th May, 1904, the purchaser received the usual amaldustak or order for possession, but on the 30th of June following, a darpatnidar, being desirous of contesting the right of the Zemindar to make the sale, sued her for its reversal. Three similar suits for the same purpose were instituted by other darpatnidars in July and August. A decree for reversal of the sale was passed in each of these suits. That in the first, suit No. 248 of 1904, was passed in the Court of First Instance on the 24th of August, 1905. An appeal to the High Court was dismissed on the 3rd of August, 1906. The decrees in the other suits, Nos. 262, 273 and 277 of 1904 were passed on the 28th of August, 1906.

By the present suit the purchaser seeks to recover from the Zemindar the sum of Rs. 57,996-3-6, the aggregate of several sums of money being (a) the amount of rent arrears due and paid by the Collector to the Zemindar out of the purchase money, (b) the expenses of the sale appropriated by the Collector out of the purchase money,(c) the patni rents paid to the Zemindar subsequent to the sale and (d) interest on these several sums and on the balance of purchase money left in the hands of the Collector.

In the Court of First Instance this suit was dismissed as barred by limitation, and this decree was affirmed by the High Court on appeal. From this decision the present appeal has been preferred.

P. C.

Hukum Chand Boid v. Pirthichand Lal Chowdhury.

Sir Lawrence Jenkins.

The principal point discussed has been the plea of limitation, and in the argument as well as throughout the earlier stages of the suit it has been assumed that this question is governed by Art. 97 in the second schedule to the Limitation Act. That article prescribes the period of limitation for a suit there described as one "for money paid upon an existing consideration which afterwards fails."

If regard be had to the peculiar character of a sale under the regulation it is manifest that the facts but imperfectly fit the phrase: they perhaps more nearly approach the formula of money had and received by the defendant for the plaintiffs use, if read as a description and apart from the technical qualifications imported in English law and procedure.

But however that may be, their Lordships feel that in view of the course the suit has consistently taken and also of the attitude on both sides here that they ought to deal with the case on the assumption, made for the purpose of this present appeal alone, but without affirming its correctness, that the present suit is competent and that it comes within the terms of Art. 97.

It is from this assumed basis that they will approach the case.

The period of limitation prescribed by Art. 97 is three years, and the time from which the period begins to run is the date of the failure of consideration.

The suit was instituted on the 14th September, 1908, and it is alleged in the plaint that the cause of action arose " On 3rd August, 1906, the date of the appellate decree in connection with suit No. 248 of 1904, and subsequently on 28th August, the date of decree in the three suits Nos. 262, 273, and 277 of 1904." These are the decrees already mentioned, and the case here made, is that it was the reversal of the sale that was the cause of action.

But by the decision in the first suit, No. 248 of 1904, the sale was reversed in its entirety and for all purposes irrespective of the decrees in the three later suits, so that if the reversal of the sale is the cause of action the only question is whether time began to run as the plaint alleges from the 3rd of August, 1906, the date of the appellate decree, or as the defendant-respondent contends, from the 24th of August, 1905, the date of the

P. C.

Hukum Chand Boid v. Pirthichand Lal Chowdhury.

Sir Lawrence Jenkins.

original decree in suit No. 248 of 1904. Both Courts have held that failure of consideration was at the date of the first Court's decree. Their Lordships feel no doubt that as between these two decrees this is the correct view, for whatever may be the theory under other systems of law, under the Indian law and procedure an original decree is not suspended by presentation of an appeal nor is its operation interrupted where the decree on appeal is one of dismissal.

To escape from this position and its consequence a new starting point was suggested in the course of the argument here: it was contended that the period of limitation began to run when possession was lost.

There may be circumstances in which a failure to get or retain possession may justly be regarded as the time from which the limitation period should run, but that is not the case here. The quality of the possession acquired by the present purchaser excludes the idea that the starting point is to be sought in a disturbance of possession or in any event other than the challenge to the sale and the negation of the purchaser's title to the entirety of what he bought involved in the decree of the 24th August, 1905. If further support of this view be required it may be found in the express provision of S. 14 of the Regulation which directs that in the suit for reversal itself the purchaser is to be indemnified against all loss.

Moreover, the argument suffers from the infirmity that necessarily attaches to a belated plea advanced for the first time when the stage for investigating the necessary facts had passed. It is enough then to say that the facts disclosed afford no ground for preferring any other event than the decree of the 24th August, 1905, as marking the time from which the period of limitation ought to run.

Their Lordships in arriving at this conclusion have not overlooked the authorities cited in argument.

When the facts in *Hanuman* v. *Hanuman* [1] are examined they lend no support to this contention. It is true that there the resistance to obtaining possession was regarded as the crucial date, but that was in circumstances bearing no real resemblance to the present, and nothing was decided which

1. (1891) L. R. 18 I. A. 158=19 Cal. 123

P. C.

Hukum-Chand Boid
v.
Pirthichand Lal Chowdhury

Sir Lawrence Jenkins

would sanction the view that the time for limitation could be postponed to a period later than the first decree in suit 248 of 1904.

The decision in *Narasing Sheobakes* v. *Pachu Ramhakas* [1] though cited in argument does not call for serious consideration.

But then it has been contended that at any rate the claim, so far as it relates to the patni rents paid to the Zamindar subsequent to the sale, is not barred by limitation.

These rents were paid on the 17th November, 1904, and the 17th May, 1905, and if, as is suggested, they are governed by a different article it can only be the 62nd, which would be an equal bar to the suit.

Further than this, their Lordships think it was rightly decided by the High Court that no suit for this amount would lie.

These conclusions are sufficient for the determination of this appeal, but there is another branch of the case that calls for notice, not so much for the purpose of this appeal as for its general bearing on litigation under S. 14 of the Regulation.

That section authorizes a suit against the Zemindar for the reversal of a sale under the Regulation, and then provides that "the purchaser shall be made a party in such suits and upon decree passing for reversal of the sale the Court shall be careful to indemnify him against all loss at the charge of the Zamindar or person at whose suit the sale may have been made.

There is no ambiguity in this provision : it is imperative and imposes on the Court without qualification the duty it indicates.

To discharge this duty a distinct issue should be framed as between the purchaser and the person chargeable under the section whether, in case the sale is reversed, the purchaser has suffered any and what loss against which he ought to be indemnified by that person. On that issue there ought to be a finding and a decision, and then any contest on this head would be finally closed subject to such right of appeal as there might be.

Though, in the judgment pronounced in suit No. 248 of 1904, there is a finding as to Hukumchand's benami character which would be conclusive against any right to indemnity, no decision as to this right is recorded, nor has it been possible to

1. (1913) I. L. R. 37 Bom. 538.

P. C.

Hukum Chand Boid v. Pirthichand Lal Chowdhury

Sir Lawrence Jenkins.

ascertain whether any such decision is embodied in the decree, for by an unexplained and regrettable omission it forms no part of the record. In the three other decrees the claim is apparently negatived, but there is no finding recorded in the judgment that could justify this decision.

And so the Courts in that series of suits failed to apply the provision of S. 14 in a manner that would be conclusive as to the purchaser's right to be indemnified. How far the remedy provided by S. 14 in a purchaser's favour excludes all other remedies, apart from any or determination of an issue, is a question of some nicety. There is much to be said in favour of its exclusive character on the score of policy and convenience. No actual decision, however, one way or the other has been brought to their Lordships' notice, for, though the language of the Chief Justice in *Radha Madhub Samanta* v. *Sasti Ram Sen* [1] seems to favour the view that the effect of the section is not to exclude all other remedies, to the actual facts of that case the provision of the section could have had no application. This is brought out in the more guarded judgment of Banerji, J. Obviously, too, the remark in 31 W. R. 252 cannot be regarded as in any sense conclusive. It was conceded in argument that this suit appeared to be one of first impression, but in the absence of more complete information as to the *cursus curiae* in India their Lordships will not say more than that the question will demand careful consideration should it hereafter arise. But they again desire to emphasize the point that if the Courts observe the duty cast on them by S. 14 this difficulty never can arise. And they would only add this, that their decision of this appeal on other grounds is due to the particular course this litigation had taken, and must not be regarded as indicating an opinion that the suit is competent.

The result, then, is that in their Lordships' opinion, this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for Appellant :—*Orr Dignam & Co.*

Solicitors for Respondent :—*T. L. Wilson & Co.*

A. P. P.

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1. (1899) I. L. R. 26 C. 826.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE OLDFIELD AND MR. JUSTICE SESHAGIRI AIYAR.

Kalavoor Chembazhi Govindan Nayar ... *Appellant** (*Plaintiff*)

v.

Kunju Nayar and others ... *Respondents* (*Defendants 1 and 17 to 34 and 2 to 16*).

Govindan Nayar v. Kunju Nayar.

Malabar Law—Tarwad—Male member of—Claim to separate maintenance—Claim to menchilavu—*Maintainability—Onus of proof.*

When a male member of a Malabar tarwad leaves the tarwad house and claims separate maintenance, the onus is on him to show some good cause for doing so. The desire on the part of the male member to live with his wife is such good cause. A claim to *menchilavu* is, for this purpose, on the same footing as a claim for maintenance.

Second appeal against the decree of the District Court of South Malabar in A. S. No. 154 of 1917 preferred against the decree of the Court of the District Munsif of Parappanangadi in O. S. No. 191 of 1915 (O. S. No. 637 of 1913) (O. S. No. 73 of 1915) on the file of the Court of the Additional District Munsif of Tirur.

C. Madhavan Nair and *Kutti Krishna Menon*, for Appellant.

C. V. Anantha Krishna Aiyar, for Respondents.

The Court delivered the following

Oldfield, J.

Judgments.—*Oldfield, J.* :—I agree unreservedly with the conclusion of my learned brother in the judgment, which he is about to deliver, that a person claiming, like the plaintiff, the appellant, separate maintenance must show some good cause for doing so and that a claim to *menchilavu* is on the same footing as a claim to maintenance.

The more difficult question is whether the plaintiff's desire to live with his wife (for that is the real justification which he can allege for his claim) is such good cause ; and I have felt great doubt whether the reasoning by which corresponding claims by female members have been countenanced in *Marudevi* v. *Pammaka* [1], *Kunchi* v. *Ammu* [2] and *Muthu Amma* v. *Gopalan* [3] should be extended. For those decisions involve, with all due difference, a radical departure from the view taken by earlier authorities. They have, however, been acquiesced in, so far as we have been shown, for over five years ; they proceeded

* S. A. No. 1036 of 1918, 14th February 1919.

1. (1911) I. L. R. 36 M 203. 2. (1912) I. L. R. 36 M. 591.

3. (1912) I. L. R. 36 M. 593.

Govindan Nayar v. Kunju Nayar.

Oldfield, J.

from learned Judges, whose competence in West Coast law commands respect; and their departure from or extension of recognised principles was deliberate. In these circumstances it seems to me that the principle as regards females must be treated as established; and if it is so, there is no reason against applying it for the benefit also of male members, since it has not been shown how any special consideration such as the right of the tarwad to any services at their hands or otherwise to their presence in it, as a condition of their right to maintenance, can be sustained against them.

I concur in allowing the appeal, reversing the decree of the District Judge and restoring that of the District Munsif. Each party will bear their own costs throughout.

Seshagiri Aiyar, J.

Seshagiri Aiyar, J. :—This is a suit by a male member of a Malabar tarwad for arrears of *menchilavu* from the tarwad. The case as it finally developed itself in the courts below is that the plaintiff left the tarwad house to help his wife to manage her tarwad affairs and also because he did find it inconvenient to live in the tarwad house: I do not think the fact that the plaintiff wanted to assist his wife to manage her affairs is a good ground for leaving the tarwad house; nor the allegation that the plaintiff found it more comfortable to live in his wife's house a sufficient ground for claiming separate maintenance. The cases discussed in *Maradevi* v. *Pammakka* [1], *Kunchi* v. *Ammu* [2] and *Muthu Amma* v. *Gopalan* [3] support the above proposition; I may say at once that I do not agree with Sadasiva Aiyar, J., in *Kunhi Krishna Menon* v. *Kunhi Kavamma* that the burden of proving proper cause or the want of it is on the karnavan. The customary law of Malabar as enunciated in the decisions of this Court is that ordinarily every member of a tarwad should live in the Tarwad house and should be maintained there by the karnavan. He may go out of the house for good and proper cause. The onus of proving that his departure is for such a cause is on the member leaving the house. This was laid down in *Kunchi* v *Ammu* [2] to which Sadasiva Aiyar, J., was a party. *Marudevi* v. *Pammakka* [1] is also to the same effect. In *Muthu Amma* v. *Gopalan* [3] Sadasiva Aiyar, J., did not start his present theory of burden of proof. I am therefore unable to agree with

1. (1911) I. L. R. 36 M 302=22 M. L. J. 390. 2. (1912) I. L. R. 36 M. 591.
3. (1912) I. L. R. 36 Mad. 593=23 M. L. J. 496. 4. (1918) 35 M. L. J. 565.

Govindan Nayar v. Kunju Nayar.

the learned Judge that everything would be regarded as a proper cause which the karnavan cannot show to be improper.

Now comes the important question whether a male member of a tarwad leaving the tarwad house solely for the purpose of living with his wife is entitled to separate maintenance. Mr. Ananthakrishna Aiyar did not question the correctness of the rulings which have laid down that a female member leaving the tarwad house for the purpose of living with her husband would be entitled to separate maintenance: see the three cases reported in I. L. R. 36 Madras series. Nor did he take exception to the principle that maintenance is given to a member of a Malabar tarwad by reason of the proprietary interest possessed by the member in the tarwad property. See *Ammani Amma* v. *Padmanabha Menon* [1].

It is not denied that a male member of a tarwad has a proprietary interest in the tarwad property. Further in the case of a female member, the customary law is that she should ordinarily reside in the tarwad house and that the husband should visit her there. That being the normal state of affairs in a tarwad, the permanent residence of a husband in the wife's tarwad cannot be regarded as an improper act on his part. The law as we have construed has made an inroad upon custom to this effect, namely, that a female member leaving the tarwad house solely for the purpose of living with her husband in his tarwad is entitled to separate maintenance. I fail to see why the same reasoning is not applicable to the converse case. I am almost inclined to regard the latter as an *a fortiori* case. But it is not necessary to go that length. There are expressions in the judgments of this Court which deduce the propriety of the cause from the ground that it is conducive to morality that the wife should be encouraged to live with her husband. It would serve the cause of morality no less that the husband should be encouraged to make his permanent home with his wife in her tarwad. Therefore I am of opinion that the present case is within the rule relating to the right of a female member making her home in her husband's tarward.

Mr. Ananthakrishna Aiyar's complaint that we shall be disrupting the tarwad if the plaintiff succeed, comes too late in the day disintegration commenced long ago.

1. (1918) I. L. R. 41 Mad. 1075=35 M. L. J. 509.

Govindan Nayar v. Kunju Nayar.

On one point I agree with him. *Melchilavu* is part of the maintenance. I do not think that there is any reason as suggested by Mr. Madhavan Nair, for placing it on a higher footing. I agree with the reasoning in *Valia Konikkal Edom Kelu* v. *Lakshmi Nettyar Amma* [1] on this point.

I would, therefore, reverse the decree of the District Judge and restore that of the District Munsif and I agree with the order as to costs made by my learned brother.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR JOHN WALLIS, CHIEF JUSTICE AND MR. JUSTICE AYLING.

Guruswami Nadar and others ... *Appellants in both the Appeals (Defendants Nos. 1, 2 and 4 to 10).*

v.

T. S. Gopalasami Odayar and others ... *Respondents (Plaintiffs Nos. 1 to 3, 5, 8 and 11th defendants.)*

Guruswami Nadar v. Gopalasami Odayar.

Evidence Act (1 *of* 1872), *S* 114 (*g*)—*Presumption—Summons by opposite party for production of account books alleged to bear upon the case—Omission to produce them and failure to explain for non-production—Effect—Hindu Law—Joint trading family—Debt contracted by manager — Presumption as to binding nature or otherwise—Onus of proof.*

Where in a suit on a promissory note executed by the deceased manager of a Hindu trading family, the surviving members raised the plea that the amount of the note was not borrowed for purposes binding on family, and, though summoned by plaintiffs to produce their books alleged to contain entries showing that the amount was utilised in the family business and that the debt was treated as a family debt, the defendants, relying upon the weakness of the direct evidence for plaintiffs, neither produced the books nor explained for their failure to produce them nor even went into the witness box.

Held, that (1) there was, under S. 114 (*g*) of the Evidence Act, a presumption that the books if produced would have been unfavourable to the defence case ; (2) the presumption was clear enough to shift the burden and to throw on the defendants the onus of proving that the debt in question was not incurred for joint family purposes.

Quære: whether, in such a case, the onus is not on the defendants to prove that the debt was not borrowed for family purposes.

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* A S Nos 207 of 1916 and 178 of 1917. 22nd January, 1919.

1. (1918) M. W. N. 379.

Guruswami Nadar v. Gopalasami Odayar.

Murugesam Pillai v. *Manickavasaka Desika Gnana Sambanda Pandara Sannadhi* [1] relied on. *Raghunathji Tarachand* v. *The Bank of Bombay* [2] referred to.

Appeal against the decree of the Court of the Subordinate Judge of Kumbakonam in Original Suit Nos. 58 of 1914 and 61 of 1914. (A. S. No. 462 of 1916, District Court, Tanjore) respectively.

The Hon'ble the Advocate-General and *K. Rajah Aiyer*, for Appellants.

The Hon'ble T. Rangachariar and *A. Srirangachariar*, for Respondents.

The Court delivered the following

Judgment :—This is a suit by the members of a temple committee to recover temple funds which were originally lent on two promissory notes Exhibits E and J dated 10th January 1893 executed by the late Ratnaswamy Nadar, brother of the 1st defendant father of defendants 2 to 4, and uncle of defendants 5 to 10. Several promissory-notes were executed in renewal of Exhibits E and J by Rathaswamy Nadar, the last of which were Exhibits A and A1. The only question is whether there is sufficient evidence to support the Subordinate Judge's finding that these debts are binding on the joint family of the defendants of which the deceased Rathnaswamy Nadar was the managing member. In 1893, when the loan was contracted his brothers were minors and there is evidence that he was carrying on the business of an abkari contractor and that the business was a 'joint family business'.

The family have been engaged in the business for a great many years, and indeed for a long time were the best known abkari contractors in Southern India. It is contended for the appellant that the plaintiffs have not shown that the debt was contracted by the late Rathnaswamy Nadar for purposes binding on the family. The members of the temple committee who advanced the loan are dead; the clerk whom they called, P. W. 8, was unable to speak from personal knowledge, and the witnesses connected with the defendants whom the plaintiffs put into the box were not anxious to help them, so that there is a dearth of direct evidence. The books of the defendants' firm if produced would show whether the money advanced was utilised in the business and the debt was treated as a family

1. (1917) I. L. R. 40 M. 402=32 M. L. J. 369, P. C.
2. (1909) I. L. R. 34 B. 72.

Guruswami Nadar v. Gopalasami Odayar.

debt. The plaintiffs summoned the defendants to produce their books, but the defendants failed to produce them or to explain their failure, and also abstained from going into the box relying on the weakness of the direct evidence for the plaintiffs. The defendants were under a duty to produce their books when summoned or to account for their failure to do so; and, as they have done neither, a presumption arises under S. 114 (g) of the Indian Evidence Act that the books if produced would have been unfavourable to their case and would have shown that the money was borrowed for the purposes of the business, which is in accordance with general probabilities of the case. The Privy Council have recently ruled in *Murugesam Pillai* v. *Manikavasaka Desika Gnana Sambanda Pandara Sannadhi*[1] that defendants are not entitled to lie by trusting to the abstract doctrine of onus of proof and refuse to furnish the court with the best material for its decision, and that if they do so, the court is free to conclude that the evidence if produced would not have supported the defendants' case. There was no doubt other evidence for the plaintiffs in that case but the presumption against the defendants arises whether the plaintiffs have any evidence or not, and in my opinion it is clear enough to shift the burden in this case assuming it to be on the plaintiffs and to throw on the defendants the onus of proving that the debts in question were not incurred for joint family purposes.

I have assumed that the onus of showing that the debt is binding on the joint family is on the plaintiffs in the first instance as is generally the case with regard to monies borrowed by the managing member:—In *Nogendra Chandra Dey* v. *Amarachandra Kundu*[2] and *Ganpat Rai* v. *Munni Lal*[3] this presumption has been held to apply even when the manager is carrying on a joint family business but as pointed out by Chandravarkar, J. in *Raghunathji Tarachand* v. *The Bank of Bombay*[4], which was not cited in the case last mentioned, the case of a joint trading family is in many ways exceptional and it appears open to question whether in such a family the presumption should not be the other way. The appeals should be dismissed with costs.

Ayling, J.—I agree.

A. S. V.

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1. (1917) I. L. R. 40 Mad. 402=32 M. L. J. 369
2. (1908) 7 C.W.N. 725.
3. (1911) I. L. R. 34 All. 135.
4. (1909) I. L. R. 34 Bom. 72.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE AYLING AND MR. JUSTICE KRISHNAN.

Ramaswami Goundan ... *Petitioner* (Petitioner before the District Collector, Trichinopoly).*

v.

Kali Goundan ... *Respondent (Counter Petitioner before Dt. Collector and Petitioner before the Deputy Collector of Namakkal).*

Ramaswami Goundan *v.* Kali Goundan.

Madras Estates Land Act Ss. 131, 192 and 205—Order passsed under S. 131—Whether High Court has power to revise the order—Interference by the High Court—Civil Procedure Code, S. 115—Deposit on the last day prescribed by S. 131, impossible by the absence of the presiding officer—Deposit made next day, whether satisfies the requirements of S. 131.

The High Court has power under S. 115 of the Civil Procedure Code to revise the decisions in all suits, appeals and other proceedings under the Madras Estates Land Act. This power also extends to cases where the Collector and the Board of Revenue have powers of revision under S. 205 of the Act.

In a case where the petitioner has applied to the Collector and the Board of Revenue, the High Court will decline to interfere, unless it is imperatively called on to do so to prevent a miscarriage of justice.

Where on the last day of the period prescribed by S. 131, the defaulting ryot finds it impossible to get his deposit received in consequence of the absence of the Deputy Collector, a deposit made on the next day will satisfy the requirements of S. 131.

Petition under S. 107 of the Government of India Act, praying the High Court to revise the order of the Court of the District Collector of Trichinopoly, dated the 16th August 1917, in D. Dis. No. 2408/, Rev. of 1917 affirming the order of the Deputy Collector of Namakkal, dated 3rd June 1917—M. P. Nos. 95 and 96 of 1917.

K. V. Sesha Aiyangar, for Petitioner.

L. S. Veeraraghava Aiyar, for Respondent.

The Court delivered the following

Judgments :—*Ayling, J.*:—This petition arises out of an order of the Deputy Collector of Namakkal under S. 131, Madras Estates Land Act, setting aside a sale for arrears of rent. Ayling, J.

The preliminary objection is taken that this Court has no power to revise such an order. I do not think this objection can be upheld. It is true that S. 205 of the Act (read with the

* C. R. P. No. 111 of 1918. 31st October, 1918.

Ramaswami Goundan v. Kali Goundan

Ayling, J.

schedule, Part B, No. 19) gives a power of revision to the Board of Revenue or the District Collector in the case of such an order: and in the present case, petitioner has invoked the interference of both the authorities named without success. But S. 192 renders S. 115 of the present Code of Civil Procedure (old S. 622) applicable to all suits, appeals and other proceedings under the Madras Estates Land Act. It may seem undesirable that the power of revising the same order should vest in two authorities so different in their constitution and ordinary procedure as this Court and the Board of Revenue; and one may wonder whether such a result was deliberately intended by the Legislature or arrived at by inadvertance. Nevertheless we have to interpret the Act as it stands. It is impossible to say that the grant of the power of revision to this Court is *inconsistent* with the grant of similar power to the Collector, and Board of Revenue: and I think it must be held that S. 192 vests this Court with the power of revision, which Petitioner invokes.

Its exercise is, of course, always discretionary; and where, as in the present case, the petitioner has previously applied to the revenue authorities under S. 205 without success, I think this Court might reasonably decline to exercise it unless imperatively called upon to do so to prevent a miscarriage of justice.

The facts of the case are clearly set forth in the order of the District Collector declining to interefere, which runs thus:

"On the 24th may the last day open to him, the counter-petitioner appeared with the deposit and applied to have the sale set aside. The Divisional Officer was absent on casual leave; the clerk therefore told him to come on the 26th which he did. In the circumstances, I cannot say that the sale was improperly cancelled even though no notice was given as it sought to have been to the purchaser.

I decline to interfere on revision and dismiss the petition."

Petitioner's main contention is that the deposit of the amount by the defaulting ryot, within the period of 30 days from the sale is a condition precedent to the passing of an order setting aside the sale; and that unless it is strictly complied with, no matter what the circumstances may be, an order

Ramaswami Goundan v. Kali Gounden.

Ayling, J.

setting aside the sale is *ultra vires* and illegal. The admitted failure to give notice to the auction-purchaser before passing the order is also said to be an infringement of O. XXI, R. 92, and to equally invalidate the order.

As regards the first objection, however strict the wording of S. 131, may seem to be, and although S. 5, Indian Limitation Act is not in terms applicable, authority is not wanting for a more reasonable and liberal interpretation of the section. *Shooshee Bhushan Rudro* v. *Govind Chunder Roy* [1] was a precisely similar case to the present one under the Bengal Tenancy Act ; the learned Judges held that, on general principles, when a fixed period is given to do a certain act, and the person bound to perform it is, from no act of his own, but from some act or order of the Court, prevented from carrying it out, he gets the advantage of the next open day. This ruling was followed and the same principle applied in other cases in the same Court (Vide *Peary Mohun Aich* v. *Ananda Charan Biswas* [2]) : and by a Bench of this Court in *Sambasiva Chári* v. *Ramaswami Reddi* [3], to a case under the Rent Recovery Act. It has been embodied in a statutory rule in S. 10 of the General Clauses Act as regards cases where the Court or office is actually closed. In the present case it may be said that the office or Court of the Deputy Collector was not closed on the last day of performance, but only the presiding Officer, the Deputy Collector himself, was absent on leave. This makes no difference. In consequence of his absence respondent found it just as impossible to get his deposit received, as if the office or Court had been shut up, and his failure to perform the act required of him within the time specified was equally occasioned by the act of the Court and by no act of his own.

I find nothing inconsistent with this in *Chundi Charan Mandal* v. *Banke Behari Lal Mandal* [4] : In that case it was not shown that the judgment debtor's failure to deposit the full amount within the prescribed period was due to any act or mistake of the Court : and the learned Judges are at pains to make it clear that, if it had been, their decision might (not to say, would) have been different. In another case quoted *Bibi Sharifan* v. *Mahomed Habibuddin* [5], there is nothing to indicate that the

1. (1861) I. L. R. 18 C. 231. 2. (1891) I. L. R 18 C. 631.
3. (1898) I. L. R. 22 M 179=8 M. L. J 265. 4. (1899) I. L. R. 26 C. 449.
5. (1911) 13 C. L J. 535.

Ramaswami Goundan v Kali Goundan.

Ayling, J.

failure to deposit within the prescribed time was due to any act of the Court; and the learned Judge whose judgment is relied on (Mookerjee, J.) had subscribed to the general principle laid down in *Shooshee Bhusan Rudro* v. *Govind Chunder Roy* [1]: Vide his judgment in *Mahomed Akbar Zaman Khan* v. *Sukdeo Pande* [2].

Appellant's vakil drew our attention to Government Notification No. 145, Revenue, dated the 27th March 1912, under which a deposit under S. 131 is allowed to be paid into any Sub-Treasury; and suggested that, as this alternative course was open to him, respondent should not be allowed the benefit of the general principle. The course prescribed by the Act is payment to the Collector; and we are in no position to say that when respondent found the latter's office closed, against him, he was in a position to avail himself of the alternative course.

In my opinion it was competent to the Deputy Collector to set aside the sale in the circumstances, although the deposit was not made within the prescribed time.

Coming to the second point, whether failure to give notice is a mere irregularity, or vitiates the whole proceedings is open to argument. But taking the view most favourable to appellant, I should not be prepared to exercise our revisionary powers in this case on that ground alone. If the objection were allowed, our only course would be to set aside the Deputy Collector's order, and remand the application for disposal after due notice to appellant. But we have now had the advantage of hearing the case fully argued in all its aspects; and it is clear that appellant could bring forward no tenable objection to the setting aside of the sale, and that the Deputy Collector's order was a perfectly just, reasonable and proper one (apart from the omission to give prior notice) To remand the case in such circumstances would be futile.

I would dismiss the petition with cost.

Krishnan, J.

Krishnan, J. :—I agree and have nothing further to add except that I have already dealt with the reversional power of the High Court in my judgment in *Paramaswami Aiyangar* v. *Alamu Nachiar* [3] which may be referred to.

C. A. S.

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1. (1890) I. L. R. 18 C. 231. 2. (1911) 13 C. L J. 467.
3. (1918) 35 M L. J 632.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SESHAGIRI AIYAR AND MR. JUSTICE PHILLIPS.

Ramalinga Chetty and others ... *Appellants** (*Defendants 1 to 3.*)

v.

Sivachidambara Chetty and others. ... *Respondents* (*Plaintiffs 1 to 7 and Defendants 4 to 11.*)

Ramalinga Chetty v. Siva-chidambara Chetty.

Hindu Law—Gift of immoveable property to a temple on occasions of marriage or death—Whether requires registration under S. 123 of the Transfer of Property Act—Manager of a joint Hindu family, whether has power to make a gift to a temple—Binding nature of the gift on the junior members.

A gift to a temple of immoveable property by a Hindu on the occasion of a marriage or death does not come within the terms of S. 123 of the Transfer of Property Act, and need not therefore be by a registered instrument.

In such a case the gift is not to any sentient being real or artificial, so as to attract S. 5 of the Transfer of Property Act.

The various modes of dedication to Hindu deities considered. *Mannu Lal* v. *Radhakishenji*,[1] dissented from.

In the performance of religious obsequies, the manager of a Hindu family is competent to make a gift of property to a temple and such a gift is binding on the junior members of the family.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Cuddalore dated 31st August 1917 in A. S. No. 83 of 1916 preferred against the decree of the Court of the District Munsif of Panruti at Cuddalore in O. S. No. 616 of 1912.

C. V. Ananthakrishna Aiyar, for Appellants.

T. R. Venkatarama Sastri, for Respondents.

The Court delivered the following

Judgment :—This is a suit to recover property. The father of defendants 1 to 3 gave about 40 cents of land to a temple in 1903 on the Sapandikaranam day of his father's death. There was no writing to evidence it. The donor was himself a trustee of the temple. During his life-time he regarded himself as a lessee on behalf of the temple and gave it the income from the land. After his death, the defendant refused either to give the income or to deliver possession of the land.

There were two main defences. One is that as the gift was not in writing and registered, no title passed to the temple. The other is that it was not competent to the donor who was a

* S. A. No. 2258 of 1917. 15th November 1918.

1. (1916) 36 I. C. 989.

Ramalinga Chetty v. Siva-chidambara Chetty.

member of a joint Hindu family at the time of the gift to dispose of ancestral property in the way he did. The courts below rejected these contentions.

In Second appeal, Mr. Ananthakrishna Aiyar relied strongly upon *Mannu Lal* v. *Radhakishenji* [1] for the first contention. The learned Judges of the Allahabad High Court do not discuss the question, nor do they refer to the decisions of the other High Courts bearing on it. It is true that the exact point now raised was not decided before, but there are observations in the judgments of this court and of the Calcutta High Court which are not consistent with the view taken in Allahabad.

Before examining the cases, we shall consider the nature of a dedication as understood by Hindus and the few texts of Hindu Law bearing on it. A dedication, offering, or oblation as it is called is generally made on the occasions of deaths or marriages in a Hindu family. The usual form is to take a leaf of the Tulasi plant in hand and with water offer the property in the presence of the persons assembled. It is not usually done before the temple, or in the presence of the trustee. The occasion is such that no writing will be thought of. We are not sure that a writing will not be regarded as detracting from the sanctity of the proceeding. The question is whether such a process is ineffectual to pass property. In the Chandogya Upanishad, this is what is stated regarding the persons who benefit by a religious offering :

अथ य एतदेवं विद्वानग्निहोत्रं जुहोति तस्य सर्वेषु लोकेषु सर्वेषु भूतेषु सर्वेष्वा त्मसुहुतं भवति॥

यथेह क्षुधिता बाला मातरं पर्युपासते ॥ एवं सर्वाणि भूतान्यग्निहोत्रमुपासत.

"He who presents an oblation, has made an offering in all worlds in all beings, in all souls * * " As in the world hungry infants press round their mother, so do all beings await the holy oblations. They await the holy oblations." The usual religious formula pronounced by every Hindu male or female, on the occasion of any offering or feeding is that it is made to God as "He is watching within all beings".

सर्वान्तर्यामी भगवान् श्रीहरिः जनार्दनः प्रीयतां.

Consequently a dedication of the kind we have referred to is intended to benefit the public in whom the spirit of God is said to reside. It is to the universal soul which pervades all

1 (1916) 36 I. C 989.

Ramalinga Chetty v. Sivachidambara Chetty.

beings. These offerings are not to any specific person, real or artificial. The learned Vakil for the appellant referred to the observations in *Jagadindra Nath Roy* v. *Hemanta Kumari Debi*, [1] where an idol was spoken of as a juridical person. It was pointed out in *Manohar Ganesh Tambekar* v. *Lakshmiram Govindram* [2] and *Bhupati Nath Smrithitirtha* v. *Ram Lal Maitra* [3] that in an ideal sense, an idol is a person capable of owning property. A person can make a gift to the trustees on behalf of an idol or he can make offerings in the temple to the idol. In these cases, the idol can and does own the property. But it does not follow from it, that a dedication must be in the form prescribed by S. 123 of the Transfer of Property Act. There are various modes of giving property to a temple. One is by giving it to the trustees. In that case, the provision of the Transfer of Property Act must be complied with. Another is by dedication to the idol itself. If this is in writing, it is open to argument that by virtue of the Registration Act, no title would pass unless the document is registered. The third mode is the one with which we are concerned and which is observed on occasions of marriage or death. Although the donor may intend that the embodiment of the Universal Soul worshipped in a particular place should have the benefit of the dedication, the words employed by him and the object aimed at by him are what has been indicated in the Chandogya Upanishad and in the formula we have referred to. In these cases, the gift is not to any sentient being, real or artificial, so as to attract S. 5 of the Transfer of Property Act.

The property thus dedicated ceases to belong to the donor. That undoubtedly is the Hindu idea. After an elaborate review of the Hindu Texts, Mr. Justice Mookerjee says in *Bhupati Nath Smrithitirtha* v. *Ram Lal Maitra* [2] "It is conclusively established from these authorities that according to strict Hindu juridical notions there can be no gift in favour of the Gods We are not concerned now with the philosophical reason for this position, and it is needless to enquire whether it is due to the fact that in the earliest time physical objects were defied, and could not, therefore, be very well supposed to be capable of acceptance of a gift, or to the fact that the deity was conceived

1. (1904) I. L R. 32 C 129 P. C. 2. (1887) I L. R. 12 B.247.
3 (1909) I L. R. 37 C. 128 at 140.

Ramalinga Chetty v. Sivachidambara Chetty.

as a being to whom a mortal could not aspire to make a gift, but could only content himself with a dedication of things for acceptance." In one of the early Texts (Vyavahara Mayuka, Chap. IV S. 7, placitum 23) it is said, quoting Katyayana that wealth which has been assigned for religious purposes is *extrà commercium.* In the Calcutta case already referred to, the same learned Judge deals with this matter in these terms: "If, therefore, a dedication is made in favour of the deity, what is the position? The owner is divested of his rights. The deity cannot accept. In whom does the property vest? The answer is that the King is the custodian of all such property. This is sufficiently indicated by the following passages: Vijnaneswara in the Mitakshara (Vyavahara Adhyaya, verse 186) lays it down that one of the duties of the King is the protection of the Devagriha; and Aparaditya and Mitramisra in their commentaries on the same subject lay down the rule in the same manner. In the Sukraneeti, Chap. IV verse 19 stress is laid upon this as one of the primary duties of Kings. The true Hindu conception of dedication for the establishment of the image of the deity, and for the maintenance thereof is that the owner divests himself of all rights in the property; the King as the ultimate protector of the state, undertakes the supervision of all endowments. There is no acceptance on the part of the deity, but from the dedication, religious merit and spiritual benefit accrue to the founder and material benefit accrues to the person in charge of the worship, and to the creatures of God." See also West, J., in *Manohar Ganesh Tambekar* v. *Lakshmiram Govindram* [1]. This conception of the effect of dedication is common to many systems of jurisprudence. In the Roman Law property dedicated to religious purpose was *extra commercium.* See Ulpian's Frag XXII Section 6. In Mahomadan Law dedications of this kind are not uncommon. It seems to us therefore, that to hold that unless a donation for religious purposes conforms to the requirements of the Transfer of Property Act, it would be invalid, would be to introduce an idea foreign at least to Hindu notions of religious donation. Of course, if the statute law imposes such a restriction, it must be obeyed. But the Transfer of Property Act is not exhaustive of all modes of

1. (1887) I. L R 12 B. 247 at p. 264.

transfer, and as we pointed out if the true intent of a dedication is not to give property to a sentient being the chapter relating to gifts can have no application to gifts by dedication. This is substantially the idea that underlies the decision in *Pallayya* v. *Ramavadhanulu* [1]. For these reasons we are of opinion that the dedication on the Sapandikaranam day divested the donor of his rights and conferred them on the temple.

Ramalinga Chetty *v.* Siva-chidambara Chetty.

On the second question reliance was placed by the learned vakil for the appellant on *Muthusami Pillai* v. *Doraisami Pillai* [2]. The occasion of the gift is not mentioned in the judgment. The learned Judges quote without disapproval *Raghunath Prasad* v. *Govinda Prasad* [3]. That judgment refers to *Gopal Chand Pandi* v. *Babu Kunwar Singh* [4], as authority. On turning to this latter decision, it is seen that the Vyavastha of the Pandit on which the conclusion was based refer to Hindu Texts and Puranic Slokas for the broad proposition that a gift to Vishnu and other deities by the manager of the family is within his competence. In Mitakshara Ch. I S. 1 placitum 28 it is stated : "Even a single individual may conclude a donation, mortgage or sale, of immoveable property, during a season of distress for the sake of the family, and especially for pious purposes." In *Hanuman Prasad Pandey* v. *Mussamut Babooee Munraj Koonwaree* [5] this proposition is quoted with approval. In placitum 29 the expression 'pious purposes' is explained thus " such as the obsequies of the father etc.,. " That explanation would undoubtedly cover the present case. It was pointed out by a Full Bench of this court in *Baba* v. *Timma* [6], that if there is a special text of Hindu Law in favour of a disposition by a manager, courts are bound to give effect to it. In *Hanmantappa* v. *Jivubai* [7], the same principle was enunciated. Having regard to these authorities and to the text of Mitakshara it seems clear that at any rate in the performance of religious obsequies the manager of a Hindu family is competent to give property to a temple. In *Rathnam* v. *Sivasubramania* [8], a silver vehicle was presented to the

1. (1903) 13 M. L. J. 364. 2. (1901) 11 M L. J. 310.
3. (1885) I. L. R. 8 A. 76.
4. (1843) 5 Sud Dew Adaw (Lower Provinces) p. 24.
5. (1856) 6 M. I. A. 407. 6. (1883) I. L. R. 7 M. 357.
7. (1900) I. L. R. 24 B. 547. 8. (1892) I. L R. 16 M. 353=3 M. L. J 189.

Ramalinga Chetty v. Siva-chidambara Chetty.

temple not on any occasion of death or marriage but as a present on an ordinary occasion. It is doubtful whether such an offering can be said to be one for religious purposes, and whether it would be covered by placita 28 and 29 of Chap. 1 S. 1 of Mitakshara. The present case is clearly within the rule enunciated in those texts. Other texts may be quoted in support of this view. But it is not necessary to multiply citations. We hold that it is not beyond the competence of a Hindu manager to make a gift of the kind we are dealing with. For these reasons, the second appeal fails and must be dismissed with costs.

C. A. S.

PRIVY COUNCIL.

PRESENT :—VISCOUNT HALDANE, LORD DUNEDIN, SIR JOHN EDGE AND MR. AMEER ALI.

[On appeal from the Chief Court of Punjab.]

Musammat Afzal-un-nissa ... *Appellant.**

v.

Abdul Karim and Others ... *Respondents.*

P. C.

Musammat Afzal-un-nissa v. Abdul Karim.

Land tenure of Punjab—Permanent tenures—Facts raising presumption of permanent tenure—Whether such presumption arises in temporarily settled districts.

Although the origin of a tenancy may not be known, yet if there is proved the fact of long possession of the tenure by the tenants and their ancestors the fact of the landlord having permitted them to build a *pucca* house upon it, the fact of the house having been there for a very considerable time, of its having been added to by successive tenants, and of the tenure having from time to time been transferred by succession and purchase, in which the landlord acquiesced or of which he had knowledge, a Court is justified in presuming that the tenure is of a permanent nature.

A. Caspersz v. *Kader Nath Sarbadhikari* [1] approved.

Semble, that there may be a permanent tenancy as between subjects even in parts of India where there is no permanent settlement.

Consolidated appeals (three) by special leave from decrees of the Punjab Chief Court dated July 30, 1912, modifying decrees of the Divisional Judge of Delhi and restoring those of the Sub-Judge.

The appellants, the landlords, served the defendants, their tenants, with notices to pay enhanced rent or in the alternative to quit. The notices not being complied with, appellants sued in ejectment, alleging defendants were tenants at will. In the alternative, they claimed enhancement of the rent paid. Defendants pleaded that they were

1. (1901) I. L. R. 28 Cal. 738

* February 11 and 18, 1919.

P. C.

Musammat Afzal un-nissa v. Abdul Karim.

permanent tenants at a fixed rent. The trial Judge found facts from which he presumed the tenancy to be permanent, and therefore (except that he decreed certain arrears of rent) dismissed the suits. On appeal the Divisional Judge concurred with the Sub-Judge that defendants were permanent tenants and not liable to ejectment, but he held that plaintiffs were entitled to enhance the rent, that Re. 1 per 100 square yards,—double the present rate—would be a fair rate, and decreed accordingly.

There were appeals and cross appeals to the Chief Court, which held that the rents could not be enhanced, restored the Sub-Judge's decrees and dismissed the suits with costs throughout In the course of their judgment the learned Judges (Beadon and Shah Din) observed:

"The defendants do not contend that a holding-at-will has been converted into a permanent tenancy merely by the erection of buildings or merely by long possession at a uniform rent. The contention is that the land was let originally on a permanent tenure for building purposes, and long possession at a uniform rent, erection of expensive buildings without interference, and transfers by sale, gift and mortgage, and by succession, are put forward as indications that from the first the tenure was permanent. It is, we think, beyond doubt that, in making his vacant land into the settlement of Kishan Ganj, Ladli Das intended that the settlers should build their own houses and settle permanently.

"The present cases, if not on all fours with *Caspersz* v. *Kader Nath Sarbadhikari* 1, are very similar to it, and we agree with the lower Courts in finding that the defendants are permanent tenants.

"The next point for decision has reference to the claim for enhancement of rent, and in this connection we have been referred to S. 22 of the Punjab Tenancy Act.

"The case of occupancy tenants of agricultural land does not appear to be analogous to that of owners of houses in a town who are permanent tenants of the sites of their houses. Agricultural land is subject to the payment of land-revenue of which the amount is altered from time to time, and the rent payable by the occupancy tenant is regulated by the amount of the land-revenue

"It is of course possible that houses in a Municipality may be subject to house-tax, but presumably such a tax would be paid by the owner of the house on the estimated rental of the house and not by the ground, landlord. At all events it has not been shewn in the present cases either that the houses in dispute are subject to a tax or that there has been any variation in the rate of rent dependent on a variation in the amount of taxes. Moreover the plaintiffs have not

1. (1901) I. L. R. 28 C. 738.

P. C.

Musammat Afzal-un-nissa v. Abdul Karim.

claimed enhancement of rent on the ground of enhancement of taxation.

"No doubt the rent of a tenant from year to year, or for a fixed term, can be enhanced at the end of the year, or term, but when the tenancy is for a specified term the rent cannot be enhanced during that term.

"In the present cases there was a permanent tenancy at a fixed rate of rent and it is difficult to see how that rate can be enhanced.

"No doubt the land has increased in value, but, in securing permanent tenants, the ground landlord fixed the rent for better or worse and, if the land had decreased in value, there is no reason to suppose that he would have accepted a lower rate of rent.

"If the ground landlord could enhance the rent at will, he might enhance it to an extent which would force the tenant to vacate and hence the enhancement of rent is inconsistent with the permanent nature of the tenancy.

"We find, therefore, that the rent cannot be enhanced and, as it has been also held that the defendants are not liable to ejectment, it is unnecessary to consider whether the notices were duly served or not."

Dunne, K. C., and *O'Gorman* for appellants, submitted that the Courts below erred in holding that the respondents were permanent tenants. Those courts have concurrently found certain facts: that the origin of the tenure is unknown, that the tenants have held possession for over 50 years at a uniform rate of rent, and that they have constructed on the land, with the landlords' acquiescence, permanent buildings. These facts might justify a presumption in respondents' favour in Bengal or any other permanently settled province. But in the Punjab the case is different, and the decision in *A. Caspersz* v. *Kader Nath Sarbadhikari* [1] relied on by the Chief Court, does not apply. Courts in the Punjab are not justified on such facts in drawing the inference that the tenancy is at a fixed rent as well as of permanent duration. In the Punjab there is no permanent settlement and permanent tenures are unknown: a landlord in the Punjab cannot grant a permanent lease.

(*Viscount Haldane*: Have you any authority for that ?)

There is no direct authority but there is no instance of any such lease having been granted.

(*Viscount Haldane* referred to *Ramsden* v. *Dyson* [2]. We have to take notice of equities. Why should not the same principles apply? It is found here that the tenants built on the land with the landlord's acquiescence.)

1. (1901) I. L. R. 28 Cal. 738. 2. (1865) L. R. 1 E. and I. App. 129.

P. C.

Musammat Afzal-un-nissa v. Abdul Karim.

Lord Dunedin.

That is so.

Dr. Majid, for respondents, was not called on.

Their Lordships' judgment was delivered (February 18, 1919,) by

Lord Dunedin :—The predecessors-in-title of the appellant in these consolidated appeals raised as plaintiffs three suits of ejectment in respect of three parcels of land held by the respondents, respectively. Questions as to sufficiency of notice were raised, but need not be alluded to. The real question at issue is raised by the defence of each of the respondents, which has been upheld by the Courts below, *viz.*, that they are permanent tenants at a fixed rent which has admittedly been paid since the beginning of the tenancy, and as such cannot be evicted on the allegation that thay are tenants-at-will.

The parcels of land in question are situated in a suburb of Delhi and are covered by buildings of masonry occupied by the respondents. It is admitted that the respondents' predecessors-in-title were invited to occupy the land for building purposes by the predecessors of the appellant in about the year 1859. No document showing the terms of occupancy is extant, nor is there any reliable oral evidence of what passed at that time. But the facts found, and as to which, indeed, there is no dispute, are that from that time onwards a uniform and fixed rent has been paid, that in some of the receipts given by the landlord the term "permanent" as applied to the rents is used, that the respondents and their predecessors-in-title have erected substantial buildings without objection on the part of the landlord, that they have dealt with their properties by way of sale and mortgage, and that the properties have passed by succession. In these circumstances the learned Judges of the Courts below have held that the case is in substantially the same position as the case of *A. Caspersz* v. *Kader Nath Sarbadhikari* [1]. The head-note of that case, which accurately represents what is decided, is in these terms :—

"Although the origin of a tenancy may not be known, yet if there is proved the fact of long possession of the tenure by the tenants and their ancestors, the fact of the landlord having permitted them to build a *pucca* house upon it, the fact of the house having been there for a very considerable time, of it having been added to by successive tenants, and of the tenure having from time to time been transferred by succession and purchase, in which the landlord acquiesced or of

1. (1901) I. L. R. 2 C. 738.

P. C.

Musammat Afzal-un-nissa v. Abdul Karim.

Lord Dunedin.

which he had knowledge, a Court is justified in presuming that the tenure is of a permanent nature."

The learned counsel for the appellant was constrained to admit that, if this case had been in Bengal, he could not contend that the judgment was not right, but argued that, though the inference was properly drawn in Bengal, it could not be properly drawn in the Punjab, on the ground that in Bengal there was a permanent settlement, whereas in the Punjab there was not. Now it is clear that an inference as to a fact to be drawn from facts depends on a mental process which is the same all the world over. The argument could, therefore, only be good if it could be shown that a permanent tenancy was a legal impossibility in the Punjab. Counsel candidly admitted that he had no direct authority for the proposition, but argued that it followed from the difference of position as to the permanent settlement. It is not clear to their Lordships why the position in a question with the Government should alter the possibility of a bargain as between landlord and tenant, but it is not necessary to give any opinion on the point, and it would be inexpedient to do so in face of the fact that the point was never taken in the pleadings and was consequently not urged before nor noticed by the learned Judges in the courts below; it is, therefore, out of the question to raise it before this Board.

Their Lordships may also add that quite apart from the ground on which the case was decided by the learned Judges below, there is another valid ground of Judgment. There were produced several sale deeds of superstructure houses on the ground by the plaintiffs' predecessors, in which there was a distinct acknowledgment that the houses themselves were held by the tenant in virtue of a permanent tenancy. This would be an estoppel as against the plaintiffs.

One other point must be noticed. The plaintiffs put forward an alternative demand for enhancement of rent. This was refused by the Subordinate Judge, but was allowed by the Divisional Judge, to whom appeal was taken. The original judgment was restored by the learned Judges of the Chief Court. It is not clear to their Lordships upon what view as to jurisdiction the Divisional Judge pronounced the decree he did, but in any case the view of the Chief Court is clearly right, that once it is settled that the original bargain was for a permanent

P. C.

Musammat Afzal-un-nissa. v. Abdul Karim.

Lord Dunedin.

tenacy at a fixed rent all question of enhancement is necessarily gone unless such a proceeding is authorised by statute.

Their Lordships will, therefore, humbly advise His Majesty to dismiss all the appeals. In terms of the condition on which special leave to appeal was granted, the appellant will pay the costs of the respondents before this Board, as between solicitor and client.

Solicitors for appellants :—*T. L. Wilson & Co.*

Solicitors for respondents :—*Truefitt & Francis.*

A. P. P.

Reporter's Note :—The other valid ground of judgment appears based on a mistake of fact. A number of sale-deeds of superstructure houses were produced : *one* only of these, of one house, by the predecessor of one plaintiff, did set out that the land was held "at permanent rate of Re. 0. 8. 0 per 100 yards per month, in accordance with the conditions fixed at the time of commencement of the Abadi of Kishen Ganj." Estoppel may have been a valid ground of judgment in one only of these appeals

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PRIVY COUNCIL.

PRESENT :—LORD ATKINSON, SIR JOHN EDGE, AND SIR WALTER PHILLIMORE, BART.

[On appeal from the High Court of Judicature at Madras.]

Adusumilli Suryanarayana and others ... *Appellants.* *

v.

Achuta Pothanna and others ... *Respondents.*

P. C.

Adusumilli Surya-narayana v. Achuta Pothanna.

Land-law of Madras—Inam grant of an Agraharam village by Indian Ruler—Kudivaram and melvaram—Jurisdiction of Civil Courts—Ownership of the soil of land in India—Whether in the Ruler or in the cultivator—Estate—Madras Estates Land Act, 1908, (*Madras Act I, of* 1908) *S.* 3, *Sub-sec.* 2 (*d*).

The ownership of the soil of land in India has always been in the Sovereign or Ruler for the time being. The fact that the Rulers generally collected their land revenues by taking a share of the produce is not evidence that the soil was not vested in and could not be granted by them, but rather supports the contrary assumption.

The presumption in the case of a grant by a native ruler is that not merely the land revenue but the soil itself, subject to rights if any of then existing occupants, was granted.

The owners of an inam village known as a *sarva agraharam* held under a gift made to their predecessors by a Reddi King in 1373. The grant was not forthcoming, but it was proved that these and similar inamdars had always regarded themselves and been regarded as full owners and had treated the actual cultivators as tenants at will. These latter now claimed to have permanent rights of occupancy and in suits for ejectment brought by their landlords pleaded that the agraharam was an "estate" under S 3 (2) of the Madras Estates Land Act 1908, (Madras Act I of 1908) and that the jurisdiction of the Civil Courts was thereby ousted :

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* May, 30 and 31, June 3, 4 and 6, 1918.

P. C.

Adusumilli Surya-narayana v. Achuta Pothanna.

Held, by the Privy Council (reversing the High Court) that in the case of a lost inam grant there is no presumption that the grant was of the revenue only; that the agraharam was not an "estate" within the meaning of the said section; and that the Civil Courts had jurisdiction to entertain the suits.

Suryanarayana v. *Potanna*, 1 reversed.

Consolidated appeals from three decrees of the Madras High Court, affirming in second appeal decrees of the District Judge of Kistna, who had reversed the decrees of the Additional District Munsif of Masulipatam.

The facts are sufficiently stated in their Lordship's judgment. The plaintiffs sued in ejectment, alleging that the lands in suit were their Sarva Agraharam Inam lands, which they had let to defendants for diverse terms of years, and that the leases had expired. Defendants pleaded *inter alia* that the lands constituted an "estate" within the meaning of S. 3, sub-section 2 (d) of the Madras Estates Land Act, 1908, that only the "melvaram" or land revenue had been granted to plaintiffs' predecessors, that plaintiffs did not own the Kudivaram (or occupancy right) and that the suits were not cognisable by the Civil Court. The Munsif held that the burden of proving that the original grantees did not own both Melvaram and Kudivaram lay upon Defendants and that they had failed to discharge it: he decreed the suits. The District Judge took the opposite view. He observed:

"It has been laid down in a series of judgments, notably *Venkatanarasimha Naidu* v. *Dandamudi Kottayya* [2] and in The Fifth Report of the Circuit Committee, that the ancient Indian Rulers claimed no ownership in the soil but only a share in the produce. It has to be presumed in the absence of the grant, that the grant was the royal share of the Revenue. (*Rajya* v. *Balakrishna Gangadhar*) [3] and the onus of proving otherwise is on plaintiff.

"This Agraharam was grantd to Brahmins there is a presumption therefore that it was a cultivated village at the time of the grant and this presumption is strengthened when we find that when we first get any actual knowledge of them they were residing in another Taluq, far away from the village and that it was only in 1846 that one of them became a resident in the village owing to the difficulty in collecting rent.

"The plaintiff distinguishes his case from the one given in *Parthasarathi Appa Rao* v. *Chevandra Venkata Narasiah* [4] and *Nadu Yrayya* v. *Kangali Naidu* [5] in that there was nothing to show the tenants were let in by the plaintiff but in this case, he contends that the defendants can be proved to have been let in under registered documents

1. (1913) I. L. R. 38 M. 608=26 M. L. J. 99.
2. (1897) I. L. R. 20 M. 299.
3. (1905) I. L. R. 29 B. 415.
4. (1910) 20 M. L. J. 596
5. (1910) I. L. R. 34 M. 246=20 M. L. J. 764.

P. C.

Adusumilli Surya-narayana v. Achuta Pothanna.

and the defendants did not claim through the previous cultivators by purchase or otherwise.

"Plaintiff further contends that in an Agraharam, the fact that there may once have been occupancy right does not make it impossible to get free of it, and he relies on S. 8 Exception, of the Act and claims that the Agraharamdar can in various ways acquire the Kudivaram and so get his estate outside the provisions of the Act.

"One thing at once strikes one against this argument and that is, that he cannot gradually acquire the Kudivaram in a number of fields of the village and then claim it for the whole village but he must acquire it for the whole village. The onus of proving that he had acquired the Kudivaram of the whole village by purchase, surrender or any of the methods he proposes, will rest on him and unless he fufils it completely he cannot in this way claim to get outside the Act by the Exception to Section 8.

"Plaintiffs' other line of argument is that if we find a certain state of affairs existing for a long period of years, say 20 years in this case, then we can assume that this was the state of affairs before it.

"Also that we must assume that the present established state of affairs must be traced to a legal origin. *Rajrup Koer* v. *Abdul Hossein* [1] *Achul Mahta* v. *Rajum Mahta* [2] and *The Secretary of State for India* v. *Haibatrao Hari* [3] where there has been a well established user extending over a long series of years. *Mahalakshmamma* v. *The Secretary of State for India* [4] is referred to for the same proposition and that long enjoyment creates presumption of an agreement. *The Secretary of State for India* v *Kota Bapanamma Garu* [5] holds that where 30 years' enjoyment was shown, previous enjoyment was to be presumed unless there was something to the contrary.

"Plaintiff argues therefore that if he can prove that the Agraharamdar has for 20 or more years been enjoying the land and not the land revenue, then the Court should find a legal origin."

After reviewing the evidence at length, he continued:—

"Taking therefore the evidence adduced by the plaintiff and the evidence adduced by the defendant, the one argues that the presumption that must be drawn is that there was a grant of the land and the other, that the grant was only of the Melvaram.

"I have set out the *pros* and *cons* for each set of arguments and the only conclusion that can be arrived at is that no safe presumption can be drawn from this evidence as to what the orignal grant was and this I think is what we might expect when we consider the history of the relations of landlord and tenant in the Circars.

1. (1880) I. L. R. 6 C 394 at 404. 2. (1881) I. L. R. 6 C. 812.
3. (1903) I. L. R. 28 .276 at 284. 4. (1910) 20 M L J. 823.
5. (1895) I. L. R 19 M. 165.

P. C.

Adusumilli Surya-narayana v. Achuta Pothanna.

"The Lower Court has very truly said that the holders of Inams, Agraharams, Zemindaries, etc., exercised absolute powers over the lands of villages and the cultivators never disputed their title and that it cannot be said that the Inamdars and Zemindars recognised any rights of the cultivators and always thought that they possessed both Kudivaram and Melvaram rights in the land and treated their cultivators as tenants-at-will or from year to year.

"Such being the general belief amongst them on which they acted, it is hardly strange to find that they were constantly setting up claims to both varams and the tenants, ignorant of their rights or unable to fight, acquiesced.

"As I am unable to deduce from the evidence that the legal origin was the grant of both varams, we have to fall back on the legal presumption that the Melvaram only was granted. The very learned judgment in *Vaman Janardan Joshi* v. *The Collector of Thana* [1] gives full reasons for this presumption to which I would refer. This brings the Agraharam therefore within S. 3 (2) (d) of the Estates Land Act and as such, suits for ejectment can only be filed in a Revenue Court, and these suits therefore, which have been filed in a Civil Court, must fail."

Plaintiffs appealed, but the learned Judges of the High Court (Sadasiva Aiyar and Spencer, JJ.) affirmed the District Judge. The proceedings in the High Court are reported at 38 Mad. 608=26 M. L. J. 99.

Plaintiffs preferred this further appeal to the Privy Council.

De Gruyther, K. C. and *Kenworthy Brown*, for Appellants: The Defendants were tenants of the Plaintiffs under leases proved to have been executed by them for varying terms of years. The Defendants admitted in the leases that they had no occupancy (Zeroyati) right to the land and agreed to give up possession on the expiry of the term. The term has expired in all cases. The High Court was in error in holding that the Madras Estates Land Act applied and that the suits were therefore cognisable by the Revenue Court alone. The lands were not an "estate" within S. 3 (2). The village was granted in Inam by a Reddi King in or about 1373. There was no evidence to show that there were any cultivated lands in existence at the time.

The burden of proving that this was a grant merely of the revenue was on the defendant. The evidence on the record establishes that the grant was of all ownership in the soil. The grant was confirmed by the British Government and Reg. 31 of 1802 shows that it

1. (1869) 6 Bom. H. C. R. 191.

P. C.

Adusumilli Suryanarayana v Achuta Pothanna.

was a grant of the soil. The lands were entered in the Register prepared under S. 16 of that Regulation. The Defendants pleaded that they had been in possession of the lands from time immemorial but both courts have found to the contrary. The evidence shows that different tenants had occupied the lands from time to time. There is no reason under those circumstances for holding that new tenants under-leases have any occupancy rights. The High Court was wrong in holding that there was a presumption in the case of an Inamdar that he was the grantee of the revenue only in the absence of evidence to the contrary. There is no such general presumption, *Ravji Mandlik* v. *Dadaji.* [1] It held that the Inamdar was the grantee of the soil. The view of the High Court is not supported by the authorities on which they relied. Reference was made to the following:—*Rajya* v. *Balkrishna Gangadhar* [2], *Vaman Janardan Joshi* v. *Collector of Thana* [3], *Badhrayya* v. *Bapayya* [4], *Cheekati Zamindar* v. *Ranasooru Dora* [5], *Narasimhulu* v. *Narasimhulu.* [6]

Moreover since the decision under appeal other learned Judges have taken the opposite view. The true view is that the onus is on the Defendants to show that the Madras Estates Land Act applies and that the Civil Courts have no jurisdiction. *Srimath Kadambi Jagannatha Charyulu Varlu* v. *Pidikiti Kutumbarayudu* [7], *Ponnusamy Padayachi* v. *Karuppudayan.* [8]

Dube, for Respondents: The grant was made by the Reddi King, who was himself a cultivator—Kistna District Manual pp. 9, 10 and 342. Under the Hindu Jurisprudence the right of the king was to take the royal share of the produce only and he had no ownership in the soil—*Mitra's Land Law of Bengal* (*TagoreLectures*) 1895 pp. 6, 22, 24; Baden Powell's Village Community in India, Ch. 5, Ss. 2, 3. The Mohammadan kings asserted their right to ownership in the soil but in practice they rarely interfered with the land revenue arrangements. The British Government is the owner of the soil but it recognised and confirmed the grants such as they were of the preceding Governments. The Rajahs in the Northern Circars had no property in the land:—Fifth Report, Vol. 2, pp. 2, 3, 6, 8, 11, 12, and 14. The British made a permanent settlement and conferred proprietary rights on the Zemindars by Reg. 25 of 1802. Provision was made in regard to tenants by Reg. 30 of 1802 but that Regulation safe-guarded the tenants' rights without using any definite word. Reg. 31 of 1802 was passed in order to deal with the titles to land of the

1. (1875) I. L. R 1 Bom. 523. 2. (1905) I. L. R. 29 Bom. 415.
3. (1869) 6 Bom. H.C.R.A.C.J. 191. 4. (1910) 21 M. L. J. 803.
5. (1900) I. L. R. 23 Mad. 318. 6. (1906) 16 M. L. J. 333.
7. (1914) I. L R. 39 Mad 21 : 27 M. L. J. 233.
8. (1914) I. L. R. 38 Mad. 438=26 M. L. J. 285.

P. C.

Adusumilli Suryanarayana v. Achuta Pothanna.

Inamdars. But the word "Land" is a colourless word meaning land revenue or the soil. The Inam Commission in its report and the title deed issued by it used "land" in the same sense. It was not until the passing of Madras Act 8 of 1869 that the use of the word "land" in connection with Inams was made clear. Madras Act 8 of 1865 was passed to consolidate the law. By this Act the Legislature did not in terms provide for the permanency of tenants' rights. There was a conflict of decisions and the rights of the tenants were judicially affirmed by the following decisions. *Vencata Mahalakshmamma* v. *Ramajogi*, [1] *Venkatanarasimha Naidu* v. *Dandamudi*, [2] *Cheekati* v. *Ranasooru*, [3]. The learned Judges ruled that new tenants coming on Zeroyati lands had exactly the same rights as the tenants who had held the possession of them before and that the burden was upon the landholder to prove his title to eject them. This judicial declaration of the rights of the ryots was based on the theory pervailing in the presidency of Madras that the Ryot possessed a permanent right in the cultivated land. It was the nature of the land and not that of the person holding it which determined the rights of the tenant. It was not necessary that the previous tenant must be the predecessor-in-title of the new tenant. The Legislature in enacting the Madras Estates Land Act intended to give its sanction to the decisions of the Judges, which were based on indirect methods or presumption. Now in the case of the tenants of Zemindars the nature of the lands determines the permanency of the tenant's right. There is no reason to hold that the Legislature did not intend that the tenants of an Inamdar should have the same rights. In view of the early history of revenue administration in India the courts have always made a presumption that an Inamdar was the grantee of Revenue only and not of the soil. Reference was made to the following :—*Krishnarao* v. *Ganesh V. Bangarao* [4], *Vaman Janardan Joshi* v. *Collector of Thana* [5], *Ravjinarayan Mandlik* v. *Bapuji Desai* [6], *Ramchandra Tantri* v. *Venkatrao* [7], *Rajya Valad Imam* v. *Balkrishna Gangadhar* [8], *Narasimhulu* v. *Narasimhulu* [9], *Lakshmi Narasimha Row* v. *Sitaramaswami* [10]; *Venkata Narasimha* v. *Subba Reddi* [11]; *Upadrasta Venkata Sastrulu* v. *Divi Sitaramudu.* [12]

The District Judge and the High Court have found on the evidence that this was not a grant of both varams. They have also found that the grantees who were Brahmins came to live in-

1. (1892) I. L. R. 16 M. 271. 2. (1897) I. L. R. 20 M 299=7 M. L. J. 251.
3. (1900) I L. R. 23 M. 318. 4. (1867) 4 Bom. H. C. R. A. C. J. 1.
5. (1869) 6 Bom. H. C. R. 191. 6. (1875) I. L. R. 1 B. 523.
7. (1882) I. L. R. 6 B. 598 8. (1905) I. L. R. 29 B. 415.
9. (1906) 16 M. L. J. 333. 10. (1913) 24 M. L. J. 288.
11. (1912) 24 M. L. J 655.
12. (1914) I. L. R. 38 M. 891 ; 26 M. L. J. 585.

P. C.

Adusumilli Surya-narayana v. Achuta Pothanna.

the village for the first time in 1846. Having regard to the Hindu Law prevailing in ancient India the courts were right in presuming that a grant to non-resident Brahmins must have been a grant of Land revenue only, as Brahmins could not be reasonably supposed to cultivate the lands. Both the lower Courts have concurrently found that the lands in question were Seri lands always cultivated by Ryots. The fact that lands were relinquished by the Ryots for some time does not change the nature of the land or interfere with the rights of the ryots-*Zemindar of Chellapali* v. *Somayya*.[1] The policy of the Madras Estates Land Act is to prevent Zeroyati land from being converted into private land. Under S. 185 of the Act it must be presumed that the lands were not private until the contrary is shown. The lands were let after the 1st July 1898 and therefore the statement in the lease that they were private lands has no effect. *Sher Bahadur Sahu* v. *Mackenzie*.[2]

In any case the appellants have not established that they had a right to eject. The suits ought to be remanded for trial as even the Munsif had not definitely found that the grant was of the soil of the village.

De Gruyther replied.

Their Lordships' judgment was delivered (July 1, 1918) by.

Sir John Edge.

Sir John Edge. :—This is a consolidated appeal from three decrees dated October 9, 1913, of the High Court at Madras, which affirmed decrees dated March 4, 1912, of the District Judge of Kistna, by which decrees dated April 18, 1911, of the Additional District Munsif of Masulipatam were set aside and the plaintiff's suits were dismissed.

The suits in which these appeals have arisen were brought on July 10, 1909, in the Court of the District Munsif of Gudivada, and were suits of ejectment from agricultural lands situate within the agraharam village of Korragunta in the Northern Circars of the Presidency of Madras. The plaintiffs are inamdars of the village, holding under an inam grant of 1373 from a Reddi King of the district. The defendants are agricultural tenants who, or whose predecessors-in-title, at various times within very recent years and before July, 1908, were respectively let into possession by the inamdars under agreements for terms, which expired in each case before the suits of ejectment were brought. By these documents of tenancy, the defendants or their predecessors in title agreed with the inamdars to quit

1. (1914) I. L. R. 39 M. 341=27 M. L. J. 718.
2. (1902) 7 C. W. N. 400.

P. C.

Adusumilli Suryanarayana v. Achuta Pothanna.

Sir John Edge.

possession of their holdings on the determination of the term for which the lands were let to them, and without claiming any Zeroyati right in the lands.

In their written statements the defendants alleged that the agraharam village is an estate within the meaning of S. 3 of Act I of 1908 (the Madras Estates Land Act, 1908), and in the alternative, and if the agraharam is not an estate within the meaning of the Act, then the defendants alleged in their written statements that they or their predecessors in the holdings had been cultivating the lands long before the formation of the Agraharam had acquired permanent rights of occupancy in the lands, and had enjoyed the lands, with such rights to the present time. It was denied that the defendants held the lands for temporary terms as alleged in the plaints, and it was stated that if it were proved that agreements of tenancy had been executed by which the lands were to be held for terms and were to be quitted on the expiration of the terms it was not admitted that such documents were executed willingly by the defendants or their predecessors or with any knowledge of their provisions. If the last statement meant anything it must have meant that the inamdars had by fraud and the exercise of undue influence procured the execution by the defendants or their predecessors of the agreements of tenancy under which the defendants held the lands occupied by them. It may be mentioned at once that no evidence to suggest that there was any foundation of truth for that statement has been brought to the attention of their Lordships, and it may be dismissed from consideration as unfounded.

If the lands form which the inamdars are seeking to eject the defendants are part of an estate within the meaning of S. 3, sub-S. 2 (d), of the Madras Estates Land Act, 1908 (Act I of 1908), as the defendants allege, the Civil Court had no jurisdiction to entertain the suits. The Munsif, who tried the suits, found on the evidence that the agraharam village in question was not an estate within the meaning of the Act, and, finding the other issues in favour of the plaintiffs, made a decree of ejectment and for mesne profits in each suit. The District Judge on appeal decided that the agraharam village was an estate within the meaning of S. 3 sub-S. 2 (d) of the Act, and dismissed the suits. The High Court on appeal directed that the plaint in each case

should be returned to the plaintiff in order that it might be presented to the Court of Revenue. It is from these decrees of the High Court that this consolidated appeal has been brought.

As the decision of this appeal mainly depends on the question as to whether the agraharam village is or is not an estate within the meaning of S. 3, sub-S. 2 (d) of the Act, it is necessary to see how an estate for the purpose of the Act is thereby defined. Clauses (a), (b), (c) and (e) of S. 3, sub-S. 2 do not apply in this case and need not be referred to. S. 3 so far as it is applicable here, is as follows :—"In this Act, unless there is something repugnant in the subject or context :......... (2) 'Estate' means.........(d) Any village of which the land revenue alone has been granted in inam to a person not owning the kudivaram thereof, provided that the grant has been confirmed or recognised by the British Government, or any separated part of such village ;........."

The term "kudivaram" is not defined in the Act. It is a Tamil word, and literally signifies a cultivator's share in the produce of land held by him, as distinguished from the landlord's share in the produce of the land received by him as ren' The landlord's share is sometimes designated "melvaram." The "kudivaram interest," an expression occurring in S. 6 of the Act, is apparently understood by the High Court at Madras as meaning a right to occupy land permanently.

The grant of the village by the Reddi King to the predecessor in title of the plaintiffs has not been produced. It would be unreasonable to expect that at this long distance of time it is still in existence. But that grant has been recognised and confirmed by the British Government, and the question is, was it a grant of Revenue only of the village, or was it a grant of the proprietary right in the village, that is, of the soil of the village? If it was a grant merely of the Revenue obtainable from the village, the village is an estate within the meaning of the Act. On the other hand, if the grant included the soil of the village, the village is not an estate within the meaning of the Act, and the decree of the Munsiff was right and should not have been set aside.

It has been contended on behalf of the respondents that in the times when the Reddi kings ruled in this district the ownership of the soil of land in India was not in the

P. C.

Adusumilli Suryanarayana v Achuta Pothanna.

Sir John Edge.

sovereign or ruler, and that the right of the ruler was confined to a right to receive as revenue a share in the produce of the soil from the cultivator. Upon that assumption it was contended that the inam grant of 1373 could have been only a grant of the King's share in the produce of the soil, that is, that the grant was a grant of land revenue alone and did not include the kudivaram. That is an assumption which no Court is entitled to make, and in support of which there is, so far as their Lordships are aware, no reliable evidence. The fact that rulers in India generally collected their land revenues by taking a share of the produce of the land is not by itself evidence that the soil of lands in India was not owned by them and could not be granted by them ; indeed, that fact would support the contrary assumption, that the soil was vested in the rulers who drew their land revenue from the soil, generally in the shape of a share in the produce of the soil, which was not a fixed and invariable share, but depended on the will of the rulers.

The assumption contended for on behalf of the respondents was not recognised in Regulation XXXI of 1802. The opening words of that Regulation are instructive ; it is there recited : "Whereas the ruling power of the provinces now subject to the Government of Fort St. George has, in conformity to the ancient usages of the country, reserved to itself and has exercised the actual proprietary right of lands of every description ; and whereas, consistently with that principle, all alienations of land, except by the consent and authority of the ruling power, are violations of that right ; but whereas considerable portions of land have been alienated by the unauthorised encroachments of the present possessors, by the clandestine collusion of local officers, or by other fraudulent means ; and whereas the permanent settlement of the land tax has been made exclusive of alienated lands of every description; it is expedient that rules should be enacted for the better ascertainment of the titles of persons holding, or claiming to hold, lands exempted from the payment of the revenue to Government under grants not being *badshahie* or royal, and for fixing an assessment on such lands of that description as may become liable to pay revenue to Government ; wherefore the following rules are enacted for that purpose."

By that regulation all grants for holding lands, exempt from the payment of revenue made previously in February 26,

P. C.

Adusumilli Surya-narayana v. Achuta Pothanna.

Sir John Edge.

1768 in the Northern Circars shall be deemed to be valid, "provided that such lands may not have escheated to the State, or may not have been resumed and assessed for the public revenue since the period of those dates respectively; and provided also that the present incumbents or their ancestors did obtain and hold actual possession of the said lands previously to the dates hereinbefore specified". The date therein before specified, so far as the Northern Circars were concerned, was February 26, 1768.

By S. 15 of Regulation XXXI of 1802 it was enacted that a register should be kept in each Zillah of the lands held exempt from the payment of revenue previously, in the case of the Northern circars to February 26, 1768, and that the registers should specify the denominations of each grant or sanad, the names of the original grantors or grantees, and the names of the present possessors, with other particulars. The earliest of such registers, from which an extract was put in evidence in these suits was Mr. Oakes' inam register ? It appears from Mr. Oakes' inam register that the whole of the agraharam village was granted by Sri Madana Vema Reddi to Ivatur Naganaradhyulu, and had been enjoyed by his successors in title for 429 years. That entry in Oakes' inam register affords, in their Lordships' opinion, conclusive evidence that the grant of the agraharam village by the Reddy king was a grant not only of the revenue but of the soil of the village and that the conclusion is supported by the dumbalas which have been put in evidence in these suits, and it is also supported by the reliable evidence in these suits showing how the inamdars dealt with the lands of the village. It is not proved, nor is there any evidence to suggest, that at the date of the grant there was any tenant in the village holding lands with any rights of occupancy by custom or otherwise.

By Act VIII of 1865 (Madras) it was enacted that inamdars and other landholders should enter written agreements with their tenants, the engagement of the landowner being termed pattah and those of the tenants termed muchilika. The pattah should contain, amongst other things, "all other special terms by which it is intended the parties shall be bound ". The muchilika should, at the option of the landholder, be a counterpart of the pattah, or a simple engagement to hold according to the

P. C.

Adusumilli Suryanarayana v. Achuta Pothanna.

Sir John Edge.

terms of the pattah. By the muchilikas which were executed by the defendants respectively or their predecessors in title the term for which the lands were let to them was specified ; it was admitted that they held no zeroyati rights and they agreed to quit the lands at the end of their term. All these muchilikas were made before the coming into force of Act 1 of 1908 and it has not been proved that when these tenancy agreements were entered into and the defendants or their predecessors in title were let into possession under them, any of the lands were, or had been, held by a raiyat with a permanent right of occupancy.

The District Judge in setting aside the decrees of the Munsif and dismissing the suits,and the learned Judges of the High Court in the decrees which they made, acted upon what they conceived to be a presumption of law, deduced by them from some decisions of the High Court at Madras and of the High Court at Bomaby to the effect that in the case of an inamdar it should be presumed, in the absence of the inam grant under which he held, that the grant was of the Royal Share of the revenue only, and they cited the decisions upon which they relied as authorities. Some of these decisions to which they referred do not, upon an examination of them, support the opinions of those Judges as to the presumption which they applied in these suits. In their Lordships' opinion there is no such presumption of law. But a grant of a village by or on behalf of the Crown under the British rule is in law to be presumed to be subject to such right of occupancy, if any, as the cultivators at the time of the grant may have had.

Their Lordships will humbly advise His Majesty that this consolidated appeal should be allowed with costs ; that the decrees of the District Judge and of the High Court should be set aside with costs, and that the decree of the munsif should be restored and affirmed.

Solicitor for Appellants :—*Douglas Grant.*

Solicitors for Respondents :—*Barrow, Rogers & Nevill.*

A. P. P.

PRIVY COUNCIL.

PRESENT :—LORD SUMNER, SIR JOHN EDGE, MR. AMEER ALI, AND SIR WALTER PHILLIMORE, BART.

[On Appeal from the High Court at Allahabad.]

Chaudhri Risal Singh and another ... *Appellant.**

v.

Balwant Singh and others ... *Respondents.*

P. C.

Chaudhri Risal Singh *v.* Balwant Singh.

Res judicata—"*Suit between the same parties*"—*Provision of Civil Procedure Code not exhaustive—Hindu female heirs, decrees against them—Binding on reversioners in the absence of fraud or collusion—personal estoppel of female heir whether it prevents her from representing the estate—Code of Civil Procedure*, 1908 (*Act V of* 1908), *S.* 11.

When the estate of a deceased Hindu has vested in a female heir a decree fairly and properly obtained against her in regard to the estate is, in the absence of fraud or collusion, binding on the reversionary heir.

A Hindu lady, otherwise qualified to represent an estate in litigation, does not cease to be so qualified merely owing to personal disability or disadvantage as a litigant.

When therefore a Hindu widow sued for a declaration that she had not validly adopted a son to her deceased husband, and the suit was dismissed on the ground (*inter alia*) that by her own acts she was personally estopped from denying the validity of the adoption, and on her death a person claiming as next reversioner sued the adopted son for the estate on an allegation that his adoption was invalid.

Held, that the previous decision barred such suit.

Appeal from a decree of the Allahabad High Court, affirming a decree of the Additional Subordinate Judge of Saharanpur.

The facts of the case will sufficiently appear from their Lordships' judgment. The sole question in this appeal was whether the Board's decision in *Rani Dharam Kunwar* v. *Balwant Singh* [1], a suit brought by the widow against the adopted son, was binding on the present (1st) plaintiff appellant, who claimed to be the reversioner if the adoption failed. The trial Judge held that it was. On appeal the Judges of the High Court differed: Sir H. Richards, C. J. holding that the widow did not in the suit brought by her represent the estate, and that hence the decree was not binding on the reversioner, while Banerji, J. took the contrary view, mainly on the ground that the Board had come to a decision on the facts. The case was therefore referred under S. 98 of the Code of Civil Prcedure to Chamier, J. who delivered the following judgment :—

"This appeal was referred to me under S. 98 of the Code of Civil Procedure in consequence of a difference of opinion between the learned Chief Justice and Mr. Justice Banerji. The point upon which they differed is whether the decision of their Lordships of the Privy

* May 3, 6, 7 and 9, 1918.

1. (1912) L. R. 39 I. A. 142=23 M. L J. 200.

P. C.

Chaudhri Risal Singh v. Balwant Singh.

Council in the suit of Rani Dharam Kunwar against the defendant-respondent, Balwant Singh, to the effect that the Rani duly adopted Balwant Singh under authority given to her by her husband, is binding upon the plaintiff-appellant, Risal Singh, who claims to be the reversionary heir of the husband, and entitled to the estate on the death of the Rani which occurred in November 1912, a few months before the present suit was brought.

"In the previous suit the Court of first instance declined to take evidence (or rather oral evidence, for the parties were required to put in their documentary evidence) on the question whether the Rani had authority to adopt Balwant Singh, and dismissed the suit on the ground that the Rani was estopped from disputing her alleged authority to make the adoption, the factum of which is beyond dispute. This Court also decided the case on the the question of estoppel confirming the decree of the first Court. The Rani appealed to His Majesty in Council; one of the grounds taken in the application for leave to appeal being that the first court should have allowed her to give evidence on the question of her authority to make the adoption. A similar ground was taken in her appeal to this Court. Their Lordships of the Privy Council agreed with the Indian Courts that the Rani was estopped from denying that she had authority to adopt Balwant Singh, but they observed that the estoppel was purely personal and would not bind any one who claimed by an independent title. They, however, as I read the judgment, decided and intended to decide that the evidence shewed that the Rani had authority to adopt Balwant Singh. I think that this is clear not only from the passages quoted by Mr. Justice Banerji, but also from earlier portions of the judgment, for example, the passage in which they say 'He gave formal and emphatic directions to his wife in regard to the adoption of a son. The Rani herself has pledged her word as to the nature and scope of those directions on more than one public and important occasion. She did so particularly in the deed of the 13th January 1899 and in her defence to the action of one Baldeo Singh'. Then later on their Lordships say that 'in reviewing the facts of the case they are of opinion that the question may well be decided as one of fact on the Rani's own statements without recourse to the doctrine of estoppel. In their view she was speaking the truth in Baldeo Singh's action when she was pleading as to her authority'. The learned Chief Justice is of opinion that though in his view the Rani's conduct rendered it difficult for her to fairly represent the estate, it might perhaps be conceded that the finding of the Privy Council would have operated as *res judicata* had the evidence as to the Rani's authority to adopt been admitted and recorded. But he thinks it is clear that, if their Lordships' attention had

P. C.

Chaudhri Risal Singh v. Balwant Singh.

been called to the fact that the first Court had declined to receive evidence, they would never have decided the case on the question of fact so as to bind the estate. It seems to me that if there was any misapprehension as to the proceedings of the first Court that might be a ground for a review of judgment, but is no ground for holding that a clear and definite decision on the question of fact is not binding on the estate. A Court may refuse to summon witnesses or admit evidence, and when its decision is subsequently relied upon as constituting a question *res judicata*, the Court trying the subsequent case cannot disregard the decision because it thinks that the Court trying the earlier case ought to have summoned the witnesses or admitted further evidence. In my opinion the Rani in the previous case represented the estate. Upon this I have nothing to add to what Mr. Justice Banerji has said. The Rani wanted to give evidence on the question of her authority, and both in appeal to this Court and in her application for leave to appeal to His Majesty in Council she complained of the action of the Court in refusing to admit that evidence. Therefore there can be no doubt that she was doing her best to shew that there had been no valid adoption and her action was in the interest of the reversionary heirs of her husband. The reports of the case in the Law Reports, Indian Appeals and in the Indian Law Reports are not as full as in the Allahabad Law Journal and the Calcutta Weekly Notes. The last-mentioned report, Vol. XVI, page 675, represents Sir Robert Finlay as having contended that the appeal to their Lordships was confined to the applicability of the doctrine of estoppel and their Lordships as having then intimated that in their opinion there were sufficient materials on the record to decide all questions arising in the suit. Whether counsel for the appellant acquiesced in this view or not it is impossible to say, but the judgment of their Lordships makes it clear that the question of the Rani's authority to make the adoption was argued. The report in the Calcutta Weekly Notes only makes clear, what one would infer from the other reports, that whether counsel for the appellants were willing to do so or not, their Lordships deliberately decided to take up the question of the Rani's authority to make the adoption. It is impossible to suppose that neither counsel for the appellant nor their Lordships were aware that the first Court had declined to take oral evidence on the subject. A perusal of the record shows that notwithstanding the order of the Court there was before their Lordships a mass of evidence bearing on the question of the Rani's authority to adopt. What was shut out must have been mainly oral evidence as to events which had happened many years ago, and it is quite possible that counsel for the Rani in deference to the opinion of their Lordships did not press the contention that the Rani should be allowed a further

P. C.
Chaudhri Risal Singh v. Balwant Singh.

opportunity of giving evidence. However that may be, I think it is clear that their Lordships deliberately decided the question knowing full well that their decision would bind the reversioners and in the hope that their decision would put a stop to further litigation."

The plaintiff's appeal to the High Court being accordingly dismissed, they preferred the present appeal to the Privy Council.

Dunne, K. C and *W. L. Richards* for Appellants.

De Gruyther, K. C. and *Parikh* for Respondents.

Dunne, K. C. for Appellants: The question is whether we are estopped by the rule of *res judicata* from denying that defendant was adopted by Rani Dharam Kunwar. The material issue is issue No. 3 in the former case, had or had not the Rani any authority from her husband to adopt Balwant Singh, and the question is whether this was heard and determined and constituted a bar. From the report in 39 I. A. 143 it is evident the case was argued before the Board as one of estoppel. The Board treated the Rani as not being entitled to raise the case as to the validity of the adoption on account of her own conduct: how then could she represent the estate? She was acting not in the interests of the estate, but purely in her own. The first Court declined to go into the issue as to the validity of the adoption, on the ground that the Rani could not raise it: the Appeal Court did the same.

(*Sir Walter Phillimore*: But that would not prevent the final Court from deciding the issue, if all the materials were taken.)

They were not taken: the Rani wes not allowed to adduce evidence.

(*De Gruyther*: The Sub-Judge did exclude oral evidence as to the authority to adopt.)

The Board have based the whole of their decision on the Rani's written statement in a previous suit in which Baldeo was plaintiff. The Rani gave evidence, but in her evidence the question of her husband having given her authority to adopt is not gone into at all. There were four issues in the case (vide 39 I. A. 146) but the only issues tried and the only issues on which evidence was given were 1 and 2, not 3, which deals with authority to adopt.

(*Sir Walter Phillimore*: Beyond the documents cited in Lord Robson's judgment was there any evidence given, any sworn evidence?

Sir John Edge: There must have been evidence, or the Board would not have come to a finding.)

It is one thing to say there is *some* evidence which prevents a particular party being heard, and quite another to say that all the evidence was taken. In the Rani's case before the Board no evidence as

to authority was dealt with: and what the Board decided was that after she had adopted she could not raise the question of the validity of the adoption, for she had no further interest. The proceedings in the High Court are reported at 30 All. 549. In her grounds of appeal to that Court the Rani complains that the lower Court refused to admit evidence "on the question of the existence and nature of the appellant's authority to adopt."

(*Mr. Ameer Ali.* Is there any reference to that in the High Court's judgment ?)

No; because they held we could not raise it. The only issue which would benefit the estate is one the Rani was not allowed to raise; how then can it be said she represented the estate ?

(*Lord Sumner*: There has been an expression of opinion by the Board on certain facts, but not on all the facts which might have been brought out if evidence had been allowed to be freely given.)

The Board's finding of fact was on an issue on which the Rani was not allowed to give evidence at all. To bind the estate there must be a fair hearing and determination of the right—there must be a fair trial not merely of the suit but of the right of the estate.

(*Lord Sumner*: You admit she was qualified to represent the estate, but you say she suffered from a personal estoppel. The same argument might be used if she were disqualified by anything else, *e, g.* lunacy, or by failure to recollect the facts.)

It may well be that if the widow went out of her mind and the suit were dismissed for non-prosecution, it would not bind the estate.

(*Sir W. Phillimore* : It is not so much a case of estoppel as of inference from the evidence—estoppel in pais. The Court may say, it's no use your calling A, B.

Mr. Ameer Ali : The Board had the whole case before them, and considered that the oral evidence excluded was worthless : that no object would be gained by a remand. The primary ground on which the Board proceeded was one of fact.)

The judgment was nothing but a judgment *inter partes* : and the question remains how far it is binding on appellants : as to this vide *Katama Nachiar* v. *The Rajah of Shivagunga* [1]. An unnecessary issue decided in a case is not *res judicata* at all : *Conch* v. *Concha.* [2] Here, as in that case, the issue was unnecessary, and it was not fair for the Board to go into it for the purpose of binding third parties. It was the more necessary that the nature of the widow's authority to adopt should be fully gone into, as an important question arose as to her power to make successive adoptions : *Kannepalli Suryanarayana* v.

1. (1863) 9 M. I. A. 589 at p. 601. 2. (1886) L. R. 11 A. C. 541, 549, 550-2.

P. C.

Chaudhri Risal Singh v. Balwant Singh.

Venkataramana,[1] cited by De Gruyther during Sir R. Finlay's argument in *Rani Dharam Kunwar* v. *Balwant Singh*[2] but on this point no evidence at all was taken.

W. L. Richards followed: The widow could not be allowed to get her adopted son to say he was not validly adopted. Further, it appears from the deed of adoption that she took the estate under the will of her husband, and not as heiress to her adopted son, and she could not, therefore, set up the latter title. Either or both of these circumstances was sufficient to prevent her representing the estate so as to bind reversioners.

De Gruyther, K. C., for Respondents: In a suit against the widow in respect of the estate the decision is binding on the reversionary heir :—*The Shivagunga Case*[3], *Jugol Kishore* v. *Maharajah Jotindro Mohan Tagore*[4], *Partab Narain Singh* v. *Trilokinath Singh*[5], *Hurrinath Chatterji* v. *Mohunt Mothoor Mohun Gosvami*[6].

These decisions have affirmed that the reversioners must be taken to be parties to the suit. It has been held that S. 11 of the Civil Procedure Code is not exhaustive: similarly, one reversioner binds another, though the second does not claim through the first. *Chiruvolu Punnama* v. *Chiruvolu Perrazu*,[7]. In *V. Venkatanarayana Pillai* v. *V. Subbamma*[8]; this Board has gone still further; remote reversioners were allowed to come in and revive a suit.

In S. 11 of the Code of Civil Procedure, I lay stress on "issue raised", "issue decided." It does not depend at all on the nature of the suit or of the cause of action.

(*Sir W. Phillimore*: You must say that the words "parties under whom they claim, litigating under the same title" have received judicial construction. If you rely on the section at all, you must bring yourself under it.) In these questions of *res judicata* the only thing of importance is the issue. *Kameshar Pershad* v. *Rajkumari Rutton Koer*[9], *Thakur Tirbhuwan Bahadur Singh* v. *Raja Rameshwar Baksh Singh*[10].

To determine what was in issue you have to look not to the decree, but to the judgment and the pleadings. *Maharaja Jagatjit Singh* v. *Rajah Sarabjil Singh*[11].

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1. (1906) L. R. 33 I. A. 145. 2. (1912) L. R 39 I. A. 142.
3. (1863) 9 M. I. A. 539. 4. (1884) L. R 11 I. A. 66, 73=10 Cal. 985.
5 (1884) L. R. 11 I. A. 197, 207=11 Cal. 186 6. (1893) L. R. 20 I. A. 183.
7. (1905) I. L. R. 29 Mad. 390=16 M. L J. 307.
8. (1913) L. R. 42 I. A. 125=28 M. L J 535=38 M. 406.
9. (1892) L. R. 19 I. A. 234. 10. (1906) L. R. 33 I. A. 156.
11. (1891) L. R. 18 I. A 165, 176.

P. C.
Chaudhri Risal Singh v. Balwant Singh.

The only decision which operates as *res judicata* is the decision of the final Court of Appeal. It is not essential that the Court of first instance should have expressed an opinion. The Court of Appeal can even remodel the issues.

Here the Privy Council exercised the power which the High Court might have exercised if it were of opinion the evidence was sufficient for the purpose. And who is to decide whether the evidence was sufficient ? Manifestly, the Court of Appeal.

(*Sir W. Phillimore.*—If the matter is obscure, the fact that the Appeal Court ought not to have so held is a strong reason for holding that it did not. Your difficulty is that the evidence of the other side was not taken).

What evidence could the Rani give ? There is no proof that she put any witness in the box, or filed any written statement, or that any question was put to a witness and ruled out.

There was a final decision of the Board that the son was properly adopted. As to the meaning of "final" in S. 11 vide *Ashghar Ali Khan* v. *Ganesh Das* [1].

"Final" does not include any intention of the Board to make it final, but merely whether the matter of contention was finally decided. It involves there being an "issue" within the meaning of S. 11.

In regard to the question of authority to adopt, no evidence of any sort or kind was given.

Dunne replied: We have throughout objected to the exclusion of evidence on the question of authority to adopt. As the Chief Justice points out, "the Courts excluded evidence which the Rani should have given if she was representing the estate." They held she was estopped from denying her authority.

(*Lord Sumner*: It would not have been decent for her to have gone into the box and denied it in view of what she had said and done.)

(*Sir John Edge*: Could you move for a new trial on the ground of surprise without saying what the evidence is ?)

(*Sir W. Phillimore*: Does not the burden lie on you to show in what respect the trial was unfair, not merely that it was hypothetically unfair ?)

It is impossible for me to say what the evidence might be.

Even supposing the finding against the Rani were justified, was it necessary ? Avowedly the Board's only reason for going into the facts was to bind the reversioners.

(*Sir W. Phillimore*: Then you must say that if a case is decided on two grounds, A and B, neither is *res judicata*).

When the Court is dealing with rights inter partes, they should if it can be helped avoid affecting third parties.

1. (1917) L. R. 44 I. A. 213=34 M. L. J. 12=I. L. R. 45 Cal. 442.

F. C.

Chaudhri Risal Singh v. Balwant Singh.

The law under which it is sought to bar me cannot be S. 11 of the Code of Civil Procedure. All the Courts are agreed that the case does not fall under that section; we do not claim through the widow. It can only be the equitable rule laid down in the Shivagunga case a rule outside S. 11, which had not then been enacted. That equitable rule is that if a point has been litigated with one representative of the property all the persons interested are bound. That any such principle should apply, the right in issue must have been fairly and properly tried. The decision on the facts here was based on statements of the widow not made on oath, which would not have been evidence at all against the reversioner.

Their Lordship's judgment was delivered (June 3, 1918) by

Sir John Edge.

Sir John Edge, :—This is an appeal from a decree dated April 29, 1915, of the High Court at Allahabad, which affirmed the decree of the Additional Subordinate Judge of Saharanpore, by which the suit of the plaintiffs had been dismissed. The suit was dismissed on the ground that a decision of the board on April 23, 1912, in an appeal to his Majesty in Council, in a previous suit, in which Balwant Singh, the principal defendant in this suit was the defendant, and the late Rani Dharam Kunwar was the plaintiff, operated as a bar to the maintenance of this suit, which is brought by the plaintiffs, who were not parties to the previous suit, and do not represent either party to the previous suit. That decision is reported [*Vide Rani Dharam Kunwar v. Balwant Singh.*] [1]

In this suit the plaintiffs are Chaudhri Risal Singh and Fateh Chand. The plaintiff Chaudhri Risal Singh claims possession of part of the Landhaura Raj, which is a large estate of great value; his claim is based on an allegation that he is the heir of Raja Jagat Prakash Singh, whom he alleges to have been the last male-owner of the estate. The other plaintiff, Fateh Chand, alleges that before suit Chaudhri Risal Singh conveyed to him the other part of the estate, and he claims possession of that other part as the grantee of Chaudhri Risal Singh. The plaintiffs also claim mesne profits.

The principal defendant is Balwant Singh, through whom the other defendants claim title. Balwant Singh's case is that the estate vested in him as the adopted son of the late Raja Raghubir Singh, to whom he alleges that he was validy adopted by the late Rani Dharam Kunwar, the widow of Raja Raghubir Singh, who admittedly died possessed of the estate. The

1 (1912) L. R. 39 I A. 142=23 M. L. J. 200.

P. C.

Chaudhri Risal Singh *v.* Balwant Singh.

Sir John Edge.

factum of the adoption was denied by the plaintiffs, but it is no longer disputed and cannot now be disputed ; the plaintiffs, however, allege that Rani Dharam Kunwar had no authority to adopt a son to her husband, and further that, if she had, the authority was a limited authority, and was exhausted by previous adoptions made by her before she went through the form of adopting Balwant Singh. The decision of the Board, which has been held by the Courts below, to operate as a bar to her maintenance of this suit, related to the adoption of Balwant Singh as a son to her late husband by Rani Dharam Kunwar.

The plaintiffs allege and the defendants deny that on the death of Rani Dharam Kunwar on November 12, 1912, the plaintiff Chaudhri Risal Singh was the next nearest reversioner, and was as such entitled to the estate of Landhaura. That issue as to the status of Chaudhri Risal Singh has not been tried, and is irrelevent if this suit is barred by the decision of the Board of April 23, 1912.

There has been much litigation relating to the title of the estate of which Raja Raghubir Singh died possessed, and in order to understand the case which was before the Board in 1912 it is necessary briefly to refer to that previous litigation and to the position of the several parties to it. Rajah Raghubir Singh died on April 23, 1868, and at the time of his death he left no son living ; his widow, Rani Dharam Kunwar was then *enceinte*, and after his death she on December 16, 1868, gave birth to Raja Jagat Prakash Singh, who was the posthumous child. Raja Jagat Prakash Singh died in childhood on August 31, 1870, and on his death Rani Dharam Kunwar, succeeded to the possession of the family property in right of her interest for life in it as his mother and heiress. The fact that she alleged that she obtained title to the property under an oral will of her husband, Raghubir Singh, is immaterial. On March 4, 1877, Rani Dharam Kunwar adopted Tofa Singh as a son to Raja Raghubir Singh. Tofa Singh, then known as Raja Narendra Singh, died in childhood about two and a half years after his adoption. On January 20, 1883, Rani Dharam Kunwar adopted another boy named Ram Sarup, as a son to Raja Raghubir Singh. Ram Sarup, then known as Ram Padab Singh, died in June, 1885. On January 13, 1899 Rani Dharam Kunwar adopted Balwant Singh the princi-

P. C.

Chaudhri Risal Singh v. Balwant Singh.

Sir John Edge.

pal defendant in the suit as a son to Raja Raghubir Singh. On January 13, 1899, Chaudhuri Ram Niwaz, who was the father of Balwant Singh, executed a deed, by which he acknowledged that he had given his son, Balwant Singh, then sixteen years old to Rani Dharam Kunwar, widow of Raja Raghubir Singh, deceased, of Rais Landhaura, as an adopted son for her and her husband, and stated that the "usual religious ceremonies and those connected with the *biradri* have been performed with all publicity to-day. From to-day the said son has no connection left with his natural family. From to-day the said son will have those rights in the whole of the property left by Raja Raghubir Singh, deceased, and possessed by the said Rani which an adopted son legally acquires. But it has been agreed between me, the executant, and the said Rani, according to the provisions of the will and permission of Raja Raghubir Singh, deceased, that she shall, till the end of her life, continue to be the owner, and possessor of the whole estate and property of every description belonging to the said Raja which exists at present or may be acquired in future; and as long as she lives all sorts of management and supervision of the estate shall rest with her as its owner."

On May 1, 1900, one Baldeo Singh, claiming to be the reversionary heir of Raja Raghubir Singh, brought a suit in the Court of the Subordinate Judge of Saharanpur against Rani Dharam Kunwar and Balwant Singh to have the adoption of Balwant Singh set aside. In that suit evidence as to the alleged adoption was taken. The main contention of Baldeo Singh, so far as the adoption of Balwant Singh was concerned, was that Raja Raghubir Singh had not given to Rani Dharam Kunwar authority to adopt a son to him, and that any authority which Raja Raghubir Singh might have given was not an authority which enabled her to make successive adoptions. No oral evidence to prove that an authority to adopt had not been given to Rani Dharam Kunwar by Raja Raghubir Singh was apparently procurable; in that suit Rani Dharam Kunwar did not give evidence, but in her written statement she alleged that she had "under valid authority and after due proclamation adopted Balwant Singh, defendant No. 2, and the aforesaid adoption is in every way proper." Her pleader in that suit stated to the court that the authority to adopt was oral, and as to the na-

P. C.
Chaudhri Risal Singh v. Balwant Singh.
Sir John Edge.

ture and scope of her authority to adopt, said that Raja Raghubir Singh's object in giving his wife authority to adopt, was that "in the event of Rani Dharam Kunwar, who was then pregnant, giving birth to a daughter, or of a son being born and dying, she should adopt, and in the event of the death of that adopted son, she should again adopt, and in the event of the last named also dying she had authority to adopt again and so on." There was documentary evidence put before the Subordinate Judge, and four witnesses were called to prove the oral authority to adopt, but the Subordinate Judge did not believe those witnesses and he found that Rani Dharam Kunwar had no authority to adopt Balwant Singh, as the authority was not one authorising her to make successive adoptions. Having found, however, that Baldeo Singh had failed to prove that he was a reversioner, the Subordinate Judge dismissed the suit, but in his decree he inserted his finding against the validity of the adoption. That decree came on appeal before the High Court at Allahabad, and the appeal was dismissed; but the High Court, on the application of Balwant Singh, struck out of the decree of the Subordinate Judge his finding as to the invalidity of the adoption on the ground that, Baldeo Singh having failed to prove that he was a reversioner, the issue as to the authority to adopt did not arise and was irrelevent. That application was resisted by Rani Dharam Kunwar, and her advocate frankly informed the High Court that her object in wishing to have the finding as to the invalidity of the adoption retained in the decree of the Subordinate Judge was that it might be used as *res judicata* in future litigation between her and Balwant Singh.

Before Baldeo Singh's suit was dismissed Rani Dharam Kunwar and Balwant Singh had quarrelled. Balwant Singh was claiming his full rights as an adopted son and was refusing to be bound by the terms as to Rani Dharam Kunwar's position with regard to the ownership, management, and control of the property that had come from Raja Raghubir Singh, which had been agreed to by Chaudhuri Ram Niwaz, in the deed of January 13, 1899, and she determined to repudiate the adoption.

On January 7, 1905, Rani Dharam Kunwar brought a suit against Balwant Singh in the Court of the Subordinate Judge of Saharanpore, and in her plaint alleged that Raja Raghubir Singh had never given her authority to adopt a son and prayed that it might be declared that she had no power to adopt

P. C.

Chaudhri Risal Singh v. Balwant Singh.

Sir John Edge.

Balwant Singh and had in fact never adopted him according to any ceremony under the Hindu Law, and that a document of January 13, 1899 in her name as the executant which purported to be a deed of adoption in favour of Balwant Singh was void and ineffectual as against her.

The deed of adoption of January 13, 1899, which Rani Dharam Kunwar sought to have declared void was a registered deed in her name and under her seal in which she alleged that Raja Raghubir Singh when he became hopeless of recovery in his last illness made the following will in her favour, she being then pregnant: "If (God forbid !) you give birth to a daughter, or if a son be born but die after his birth, I strictly order you to adopt some boy to me so that he might perform my Sradh ceremony and yours, and perpetuate my name and after your death become the absolute owner and possessor of the whole of my estate. If (God forbid !) the son who might be adopted under this authority should die in your life-time you will have power to adopt another boy."

In that deed Rani Dharam Kunwar, amongst several other things, also alleged that she on the day on which the deed bears date, after performing the necessary ceremonies, adopted Balwant Singh, son of Chaudhri Ram Niwaz to herself and her husband in the presence of the gentry, the district authorities, and other European Gentlemen, and the members of her biradri; and that Chaudhri Ram Niwaz gave Balwant Singh to her as an adopted son. That deed was on January 19, 1899, duly registered by the Sub-Registrar of Rurki, Rani Dharam Kunwar, having first personally admitted in the presence of the Sub-Registrar its execution by her. In her plaint in her suit against Balwant Singh she endeavoured to explain away that deed by alleging that she had no knowledge of it before July, 1904; that she had not got it registered ; that it was written in her name without her knowledge on January 13, 1889, by one Tahauwar Ali, who was her Diwan in charge of her entire business, and was her adviser, and that he had got it registered. She also alleged in her plaint that having learnt during the pendency of Baldeo Singh's suit that Tahauwar Ali was secretly in collusion with Balwant Singh she dismissed him and she also endeavoured to explain away her written statement in the suit of Baldeo Singh, admitting the adoption of Balwant Singh and her pleader's

statement in that suit as to her authority to make an adoption, by denying that her written statement and her pleader's statement had been authorised by her.

P. C.

Chaudhri Risal Singh v. Balwant Singh.

Sir John Edge.

In the suit of Rani Dharam Kunwar against Balwant Singh he in his written statement, amongst other things alleged that Rani Dharam Kunwar had authority to adopt him to Raja Raghubir Singh and that he had been validly adopted. The Subordinate Judge held that Rani Dharam Kunwar was by her acts estopped from denying that Balwant Singh had been validly adopted to Raja Raghubir Singh, and did not try any other issue. The High Court at Allahabad, agreeing with the Subordinate Judge, dismissed the appeal of Rani Dharam Kunwar and thereupon she appealed to His Majesty in Council and again failed. The facts which this Board has stated as to the history of the litigation and as to the position of parties and their acts have been derived from the record of the appeal to His Majesty in Council in which the Board gave its decision of April 23, 1912. The evidence upon which that decision was arrived at was before the board in the record of that appeal. It is said that evidence to show that Rani Dharam Kunwar had no authority to adopt Balwant Singh had been excluded in her suit, and that consequently the Board in 1912 ought not to have found that Balwant Singh had been validly adopted. It is true that Rani Dharam Kunwar applied to the Subordinate Judge that evidence should be taken, but it does not appear that she ever applied to have witnesses summoned or tendered any evidence which was rejected. It is difficult to conceive what oral evidence Rani Dharam Kunwar could have produced, except her own personal evidence, to prove that she had received from Raja Raghubir Singh no authority to adopt, and if she had given evidence that she had no authority to make the adoption such evidence, having regard to her own acts and documentary evidence on the record, could not have been accepted as true.

Their Lordships in this appeal pressed the learned counsel who appeared for the appellants to state what oral evidence there was available to prove or to suggest that Raja Raghubir Singh had not in his final illness given to Rani Dharam Kunwar his authority to adopt, but the learned counsel was not in a position to suggest what oral evidence could have been produced. The Board in 1912 was satisfied, and rightly satisfied, that no further evidence as to the authority or absence of authority to

P. C.

Chaudhri Risal Singh v. Balwant Singh.

Sir John Edge.

adopt could be expected to be produced by anybody beyond the evidence then already taken. As appears from the report of the case in Allahabad Law Journal Reports, Vol.9 p. 730, the learned counsel for Rani Dharam Kunwar contended in argument before the Board in 1912 that if it were held that Rani Dharam Kunwar was not estopped from denying that Balwant Singh had been validly adopted, the question arose whether she had any authority to adopt him; and further contended that such authority as she alleged would not extend to the adoption in question. There was ample material in the appeal record before the Board in 1912 upon which the Board might find that Raja Raghubir Singh had given authority to Rani Dharam Kunwar to adopt a son to him, and that such authority was a general authority and was not limited to making one or more successive adoptions.

It is clear that the Board in 1912 did intend to decide the question of authority to adopt as a question of fact. In the judgment of the board it is said: "The third question, *viz.*, as to whether the Rani had authority from her husband to adopt the defendant gives rise to the point which has been argued before their Lordships." And then their Lordships dealt with the contentions on that subject, and found that Raja Raghubir Singh had given to Rani Dharam Kunwar a general power to adopt which justified her adoption of Balwant Singh, and said: "Their Lordships, in reviewing the facts of the case are of opinion that the question may well be decided as one of fact on the Rani's own statements without recourse to the doctrine of estoppel. In their view she was speaking the truth in Baldeo Singh's action when pleading as to her authority."

It is clear that the reasons of the Board in 1912, for deciding thus as to the facts and for not confining the decision to the question of the estoppel were to quiet any religious scruples, which might have arisen if Raja Raghubir Singh could be said to have a son only by estoppel to perform religious duties, and also to put a stop to further litigation as to the validity of the adoption of Balwant Singh.

There can be no doubt, in their Lordships' opinion, that Rani Dharam Kunwar in her suit against Balwant Singh did, notwithstanding the personal estoppel under which she laboured, represent the estate on the question of fact as to whether

P. C.

Chaudhri Risal Singh v. Balwant Singh.

Sir John Edge.

Balwant Singh had or had not been validly adopted, and that she represented the estate within the meaning of the rule in *Katama Natchiar* v. *Raja of Shivagunga.* [1] The principle of law to be applied in such cases was, their Lordships consider, correctly summarised by Banerji, J., in his judgment in this case thus : " Where the estate of a deceased Hindu has vested in a female heir a decree fairly and properly obtained against her in regard to the estate is, in the absence of fraud or collusion, binding on the reversionary heir." It cannot be said that there had not been a fair trial by the Board in 1912 of the right in the suit of Rani Dharam Kunwar against Balwant Singh. The right in that suit was his right to the estate as a son validly adopted to Raja Raghubir Singh. It is true, as was pointed out in a judgment of the High Court in this suit, that the rule of *res judicata,* as enacted in S. 11, of the Code of Civil Procedure, 1908, is not strictly applicable in this case, as the plaintiffs were not parties to the suit of Rani Dharam Kunwar against Balwant Singh, and do not claim under a party to that suit, but the principle of *res judicata* has been applied rightly by the Courts in India so as to bind reversioners by decisions in litigation, fairly and honestly conducted, given for or against Hindu females who represented estates, as Rani Dharam Kunwar did in her suit against Balwant Singh.

It has been urged by the learned counsel for the appellants here that Rani Dharam Kunwar cannot be regarded as having represented the estate in her suit against Balwant Singh, as by her acts she was personally estopped from denying that she had validly adopted him to Raja Raghubir Singh. In the absence of all authority, their Lordships cannot decide that a Hindu lady otherwise qualified to represent an estate in litigation, ceases to be so qualified merely owing to personal disability or disadvantage as a litigant although the merits are tried and the trial is fair and honest. The principle is that reversioners must risk that, so that there may be an end to litigation.

Their Lordships will humbly advise His Majesty that this appeal fails and should be dismissed with costs.

Solicitors for Appellants:—*T. L. Wilson & Co.,*

Solicitor for Respondents:—*E. Dalgado.*

A. P. P.

1. (1863) 9 M. I. A. 539.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR JOHN WALLIS, CHIEF JUSTICE AND MR. JUSTICE SESHAGIRI AIYAR.

Kumarappa Chettiar and others ... *Appellants* * (*Defendants Nos. 3 to 7 and 9 to 12*)

v.

Saminatha Chettiar *alias* Avatha Chettiar and others ... *Respondents* (*Plaintiff and Defendants Nos. 1 and 2*).

Kumarappa Chettiar v. Saminatha Chettiar.

Limitation Act, Art 127 and 144—Exclusion from joint family property—Possession by individual members of specific items of property—Whether amounts to exclusion of the other members—Co-tenancy—Possession by a co-tenant of a specific portion of the property—Adverse possession—English and Indian Law on the subject reviewed.

In the case of joint family property, to bar the right of the plaintiff under Art. 127 of the Limitation Act, there must be exclusion from the whole of the joint family property; and mere exclusion from specific items of joint family property will not suffice. *Vishnu Ramachandra* v. *Ganesh Appaji Chaudhari* 1 dissented from.

In the case of a tenancy in common, the possession by one co-tenant of a specific portion of the property does not amount to adverse possession as against the other co-tenants in the absence of clear evidence of ouster

Per *Seshagiri Aiyar, J*:—The history of the law in England and India as to adverse possession among co-tenants reviewed.

Appeal against the decree of the Court of the Subordinate Judge of Kumbakonum, in O. S. No. 60 of 1916.

[The facts are fully set out in Mr. Justice Seshagiri Aiyar's Judgment.]

T. R. Venkatarama Sastri and *K R. Rangaswami Aiyangar*, for Appellant.

T. Narasimha Aiyangar and *M. S. Ramanuja Aiyangar*, for Respondents.

The Court delivered the following

Wallis C. J.

Judgments :—*The Chief Justice*:—I have had the advantage of reading the judgment prepared by Seshagiri Aiyar, J., and will state my conclusions very briefly. If the property was undivided and article 127 is applicable, I entirely agree with him that to bar the plaintiff there must be exclusion from the whole of the joint family property and that exclusion from the suit property only will not do. The decision in *Vishnu Ramachandra* v. *Appaji Chaudhari* 1 appears to me to be opposed to the decree of the Privy Council in the *Balgaum case* 2 and to the other

* A S No. 358 of 1917. 15th October, 1918.

1. (1895) I. L. R. 21 Bom. 325. 2. (1897) I. L. R 20 M. 256.

cases cited by my learned brother as well as to the language of the article and I am unable to follow it. Assuming however that a division must be presumed to have taken place, it is said that article 127 does not apply because the plaintiff is not a person excluded from joint family property within the meaning of the article but only a tenant in common excluded from the common property. The words "Joint family property" are used in the corresponding section 1 clause 13 of the Act of 1859, and I think the scope of the two enactments is the same though the starting points of limitation are different. It is in my opinion unnecessary to review the decisions on the question whether the words 'joint family property' in the article apply where there has been a division in status but no division of immoveable properties by metes and bounds. In such a case if article 127 does not apply article 144 must apply. Under that article the suit would not be barred, as the possession of one tenant in common is the possession of all, and is not adverse to his co-tenants in the absence of clear evidence of ouster, *Corea* v. *Appuswamy* [1]. The Subordinate Judge has not found that there was anything amounting to ouster in this case, and there is no sufficient evidence of it. I agree with the order proposed by my learned brother.

Kumarappa Chettiar v. Saminatha Chettiar.

Wallis, C. J.

Seshagiri Aiyar, J.

Seshagiri Aiyar, J :—This is a suit for partition. Defendants 1 and 2 represent one branch ; defendants 3, 4 and 5 the second branch ; the 6th defendant the third branch ; and the 7th defendant the 4th branch. The fifth branch is not represented in this litigation. Defendants 8 to 12 are alienees from defendants 3 to 7. The plaintiffs purchased the suit properties from defendants 1 and 2. The plaintiffs' case is that the family was divided and that as purchasers from defendants 1 and 2 they are entitled to the sole possession of the properties in the suit. They also set up the alternate plea that defendants 1 and 2 had acquired title by prescription to the properties.

The defence is that the members of the family are undivided and that the plaintiffs are not entitled to more than a fifth share in the properties conveyed to them. The Subordinate Judge held that as the plaintiffs' vendors were in exclusive and hostile possession of the suit properties for more than 12 years they were competent to convey them to the plaintiffs. He

1. L. R. (1912) A. C. 230

Kumarappa Chettiar v. Saminatha Chettiar.

Seshagiri Aiyar, J.

also expressed the opinion that the five branches had become divided in status, though the properties were not divided by metes and bounds. The appeal was argued on the supposition that the finding as to division of status was correct without deciding the point.

The point for decision is whether the possession of defendants 1 and 2 of a portion of the family properties was adverse to the other members of the family. In my opinion, the decision of the Subordinate Judge is wrong. I shall shortly trace the history of the legislation regarding adverse possession by co-tenants in England and in India before dealing with the decided cases. In England before the enactment of 3 and 4 William IV Ch. 27 the law as to possession by co-tenants was this (Vide the First Report of the Common Law Commissioners made in the year 1851 as to forms of action relating to ejectment). "In cases where by reason of the rule plaintiff and defendant being tenants in common, joint tenants or co-parceners an actual ouster must be established in order to found an action of trespass the rule is modified by requiring the substituted defendant to admit fictitious ouster only in case an actual ouster of the lessor of the plaintiff is proved." Then came the statute of 3 and 4 William IV Ch. 27. S. 12 ran thus :—" that when any one or more of several persons entitled to any land or rent as co-parceners, joint tenants, or tenants in common, shall have been in possession or receipt of the entirety or more than his or their undivided share or shares of such land or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt *shall not be deemed to have been the possession* or receipt of or by such last mentioned person or persons or any of them." This section was apparently enacted to negative the presumption that possession by one co-tenant is possession on behalf of all of them. As was pointed out in *Holmes* v. *Newlands*[1] and *Culley* v. *Doe*[2] before the statute of William IV, there was no adverse possession in such cases. The bare receipt of all rents and profits by a tenant in common was not adverse to his co-tenants. *Reading* v. *Rawsterne*,[3] *Fairclaim* v. *Shackleton*[4]. In *Peaceable* v. *Read*,[5] it was held that where one tenant in

1. (1839) 11 Ad. and El. 44. 2. (1840) 11 Ad and El. 1003.
3. (1702) 2 Lord Raymond 829 : 92 E. R 54.
4. (1770) 5 Bur. 2604. 5 (1801) 1 East 568.

Kumarappa Chettiar v. Saminatha Chettiar.

Seshagiri Aiyar, J.

common levied a fine and received all the rents for more than five years afterwards without any entry or claim made to avoid the fine, no actual ouster of his co-tenant could be presumed. After the passing of the statute, as has been pointed out in 19 Halsbury para 247. "The possession of the joint tenants, tenants in common, and co-parceners is separate and is not the possession of the other joint tenants." It was held in *Thornton* v. *France* [1] that if a person entitled to an undivided share in the land, is in exclusive possession of the whole land or any part of it, the title of his co-owner to his undivided share would be extinguished by such possession. In *Glyn* v. *Howell,* [2] Eve, J says:—"Mr. Upjohn is right when he says the decisions have proceeded upon two lines, the one being those cases where the possession of the part has been treated as possession of the whole, because the court has found, either by contract or according to conscience that possession of the whole is what the person possessed of the part was intended to have, and the other being those cases in which the court, finding no just reason for inferring, in favour of a person relying solely on possession of a part, a constructive possession of the whole, has refused to make such inference." This is the state of law under 3 and 4 William IV. Now we have to see how the law stands in India. Under Act 14 of 1859, S. 1 cl. 13 enacted the general rule that suits to enforce the right to share in any property moveable or immoveable on the ground that it is the joint family property must be brought within 12 years from the death of the person from whom the property alleged to be joint is said to have descended or from the date of the last payment to the plaintiff or any person through whom he claims, by the person in the possession or management of such property or estate on account of such alleged share. The Limitation Acts of 1871 and of 1877 although they fixed the starting point of Limitation from demand and refusal in the one case, and from exclusion in the other, introduced no substantial changes in the first column of the schedule. Two things are clear from the history of the Indian Limitation Acts. One is that no distinction is made between moveable and immoveable property as in the case of 3 and 4 Willaim IV. Secondly there is no special provision regarding the hostile possession of tenants in common. The reason is not far to seek. In India co-parcenery

1. L. R. (1897) 2 Q B 143.
2. L. R. (1909) 1 Ch 666.

Kumarappa Chettiar v. Saminatha Chettiar.

Seshagiri Aiyar, J.

and joint enjoyment are normal; whereas in England they are exceptions. The legislature apparently, considered that it would be dangerous to introduce the principle enunciated in 3 and 4 William IV into this country, where managers and other members of the family are ordinarily in enjoyment of either the whole or portions of the property exclusively to avoid the disruption of the family ties and the partition of family properties.

I am of opinion that the decisions passed on S. 1 Cl. 13 of Act XIV of 1859 govern Art. 127 in the later Acts. Under the Act of 1859 it was held in *Ranjeet Singh* v. *Kooer Gujraj Singh* [1], that if one of the members of the family was in possession of only a portion of the property to the exclusion of the others the presumption will be that the possession was for and on behalf of the other members of the family. This is what their Lordships say :—"Their Lordships entertaining the view which they have expressed, there was no partition, but that the platntiffs took the seer land as equivalent to a payment in respect of their shares by the defendant, are of opinion that the proceeds of those seer lands have been substantially payments by the defendant within the meaning of that section, payments which have continued to the time of action brought, and that, therefore, the Statute of Limitation does not apply." In *Sakho Narayan Khandalkar* v. *Narayan Bhikkaji Khandalkar* [2], the learned Judges say "But in the class of cases similar to the one before us, where both parties are in possession of portions, we should require a definite finding as to whether there had or had not been partition between the parties. In this particular case we have a clear finding that no partition was made, and that each party is in possession of a portion of the entire estate, either by mutual agreement or accidental circumstances. In this view of the matter we consider the suit not barred." In the *Udayarpalayam Case* [3], which related to the Udayarpalayam Zemindari it was pointed out "that although one member of the family was in sole possession of the estate the receipt of maintenance by the other member and his enjoyment of portions of property allotted to him for maintenance would be regarded as participation in the family income." In *Sri Raja Lakshmi Devi Garu* v. *Sri Raja Surya*

1. (1873) L. R. 1 I. A. page 9. 2. (1869) 6 Bom. H. C R. 238 at p. 241.
3. (1901) I L. R. 24 Mad 562.

Kumarappa Chettiar v. Saminatha Chettiar.

Seshagiri Aiyar, J.

Narayana Dhatraju Bahadur Garu,[1] which related to the Belgaum Zemindary one member of the family believing the estate to be impartible was in sole possession of the major portion of the zemindary. The others were given a few villages for their maintenance. After the death of the last zemindar the question was whether the other members who were enjoying the villages for maintenance were not barred by limitation. On behalf of the widow the plea of limitation was raised on the ground that the other members notwithstanding their possession of portions of property were excluded from the zemindari. Both the High Court and the Judicial Committee overruled this contention. They held that so long as there was no total exclusion of the claimants there can be no adverse possession in favour of persons holding portions of the property. As against these decisions we were referred to *Vishnu Ramachandra* v. *Ganesh Appaji Chaudhari*[2] in which it was held that the possession of a part of the property exclusively by a member of the joint family would be hostile to the other members of the family. I am unable to agree with thi decision. It is inconsistent with the decisions I have quoted a d with the judgment of Lord Macnaughten in *Corea* v. *Appuswamy*[3] where it was pointed : "Before the Act 3 and 4 William IV was passed it was a settled rule of law that the possession of any one of such persons was the possession of the other or others of the co-proprietors. It was not disputed at the Bar that such is now the law in Ceylon." I may add that this is the law in India as well. Having regard to the decisions I have referred to and to the observations of Lord Macnaughten it seems to me that the decision in *Vishnu Ramachandra* v. *Ganesh Appaji Chaudhari*[2] is not right. There is only one other decision to which I shall refer and that is the decision in *Lakshman Dada Naik* v. *Ramachandra Naik*[4]. That was a case in which the co-parcenor wanted to establish his right to his own share as well as to a moiety of his father's interest to which he became entitled on the death of his father. It was held that S. 1 Clause 13 of the Act of 1859 applied to such a case. As regards the plea of limitation the Judicial Committee says at page 59 :—"Now, as far as the immoveable property of the family is concerned, there seems to me no ground for the application of the statute. Not only has the respondent all along

1. (1897) I. L. R. 20 Mad. 256.
2. (1895) I. L. R. 21 Bom. 325.
3. (1912) L. R. A. C. 230.
4. (1880) I. L. R. 5 Bom. 48.

Kumarappa Chettiar v. Saminatha Chettiar.

Seshagiri Aiyar J.

been in the enjoyment of part of that property *viz.*, the house at Shahpur but is also entitled to exclude from the computation the period of limitation during which he had prosecuted the suit." This decision is authority for the proposition that possession of part of the property would save limitation, as regards the rest of the property. In the present case it is not denied that defendants 3 to 12 have been in possession of portions of the joint family property.

It was contended for the respondent that the expression "joint family property" in article 127 does not apply to the case of persons who have become divided in status. Granting this contention is well founded as to which I express no opinion the cases referred to by me establish that even if article 144 applied to the case, the possession of the plaintiff's vendor would not be adverse to the other defendants. In any view therefore the decision of the Court below is wrong and his decree must be reversed.

The plaintiffs as purchasers of the shares of defendants 1 and 2 are entitled to a 2/5th share in the suit properties by partition and to the mesne profits on that share from the date mentioned in the judgment of the Subordinate Judge: plaintiffs are entitled to the damages awarded by the Lower Court, on the security of the B schedule properties as provided in the judment of the lower court. Plaintiffs are entitled to the costs from the respondents 1 and 2 who in their turn will get all their costs from respondents 3 and 4 personally and on the security of the B schedule properties inclusive of what they pay appellants (defendants 3 to 7 and 9 to 12) for their costs in both the courts: Plaintiffs are also entitled to interest on Rs. 7,500 from 26th March 1912 up to date of payment.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SADASIVA AIYAR AND MR. JUSTICE SPENCER.

Srinivasa Raghava Aiyangar ... *Appellant**
(Plaintiff.)

v.

K. R. Ranganatha Aiyangar and others ... *Respondents*
(Defendants.)

Srinivasa Raghava Aiyangar v. Ranganatha Aiyangar.

Contract—Consideration—Forbearance to sue, though not for a specified period—Whether can support a security bond after the execution of promissory note—Charge

* S. A. No. 2510 of 1917. 27th November, 1918.

Srinivasa Raghava Aiyangar v. Ranganatha Aiyangar.

on immoveable property to secure payment of a sum of money—Purchaser of immoveable property without notice of the charge—Whether takes subject to the charge—Distinction between mortgage and charge.

Where a promissory note for a certain sum is executed and a few days later, the maker of the promissory note executes a security bond charging immoveable properties in favour of the payee for the same sum in consideration of the latter's forbearance to sue though not for a specified period, such security bond is supported by good consideration.

An act of forbearance on the part of the creditor, though it may not be for a definite period is a good consideration for a fresh contract based on it.

Alliance Bank v. *Broom* [1], *Fullerton* v. *Provincial Bank of Ireland* [2], *Glegg* v. *Bromby* [3], referred to.

Where there is a charge of immoveable property to secure payment of a sum of money supported by consideration, a purchaser of the immoveable property although without notice of the charge, takes it only subject to the charge.

Distinction between mortgage and charge pointed out by Sadasiva Ayiar, J.

Second Appeal against the decree of the District Court of Tanjore in A. S. No. 790 of 1915, preferred against the decree of the Court of the Subordinate Judge of Kumbakonum in O. S. No. 47 of 1915.

T. R. Venkatarama Sastri and *S. Parthasarathi Aiyar*, for Appellant.

K. Bhashyam Aiyangar and *K. Narasimha Aiyangar*, for Respondents.

The Court delivered the following

Spencer, J.

Judgments :—*Spencer, J.*:—The first defendant in this suit executed a promissory note for Rs. 2,500 on 4th December 1913 in favour of one Aramudachari and two days later gave a security-bond to the same individual for the same debt. The plaintiff obtained an assignment of both instruments and sued upon them. The second defendant is a subsequent purchaser; and the third defendant is the Official Receiver of Tanjore, who was made a party in consequence of first defendant's nsolvency. The plaintiff has succeeded in obtaining a personal decree against first defendant for what was due upon the promissory note, but his claim to be allowed to enforce his charge upon the first defendant's immoveable properties has been refused by both the lower Courts on the ground that there was no consideration for the security-bond (Ex. C), and upon this point he has lodged this second appeal.

1. (1864) 2 Dr. and Sm. 289=34 L.J. Ch. 256. 2. (1908) A. C. 309.
3. (1912) 3 K. B. 474.

Srinivasa Raghava Aiyangar v. Ranganatha Aiyangar.

Spencer, J.

The considration for Ex. C is stated in para. 4 of the plaint to be the forbearance of the payee under the promissory note (Ex. A) to press the first defendant for payment when he became aware after the execution of Ex. A of the great extent of first defendant's indebtedness and his concession of some time before filing a suit. Both the Subordinate Judge and the District Judge, in considering the issue relating to consideration for the security-bond, in my opinion, misdirected themselves on the question of law involved in this issue.

The Subordinate Judge followed *Manna Lal* v. *Bank of Bengal* [1] which he thought to be exactly in point. The District Judge seems to think that forbearance to sue must be forbearance for some particular time in order to constitute valuable consideration, as he rejects the evidence of the payee Aramudachari himself (P. W. 2) on account of his failure to specify the length of time he gave the first defendant when he executed Ex. C, although it does not appear from his deposition that any question was put to the witness on this point. *Manna Lal* v. *Bank of Bengal* [1], has been followed by this Court in *Muthukaruppa Mudali* v. *Kathapudayan* [2], but both those cases are distinguishable from the present case on the facts. In the former case the hundi debt had not matured when the acceptor of the hundis pledged his own house and shops as security for due payment and thus there was obviously no consideration for the pledge. In the latter case it was held that a mere recommendation by A of a borrower B was not good consideration for a contract based on a subsequent promise to the lender C to pay advances made to B.

Both in England and in India it is settled law that past consideration may be good consideration if there has been a precedent request (vide *Lampleigh* v. *Braithwaite* [3] and *Sinda Sri Ganpatsinghji* v. *Abraham* alias *Vajir* [4] and Pollock and Mulla's Contract Act, 3rd Edn., page 22), and forbearance from suing comes under the expression 'does or abstains from doing' under S. 2 (d) of the Indian Contract Act which defines 'consideration.'

In the present case forbearance from suing has been set up in the plaint, there is evidence to support the plea, and there is

1. (1876) I. L. R. 1 A. 309.
2. (1914) 27 M. L. J. 249.
3. D. Sm. L. C. Vol. I, 10th Edn. 136.
4. (1895) I. L. R. 20 B. 755.

Srinivasa Raghava Aiyangar v. Ranganatha Aiyangar.

Spencer, J.

the fact that the first defendant was not actually sued upon the promissory note from the date of its execution—4th December 1913—till this suit was brought on 12th July 1915. Even in the absence of evidence it was open to the lower Courts to have presumed from the circumstances of the case that the security bond would not have been given unless the creditor had expressed his dissatisfaction with the promissory note payable on demand.

In the *Alliance Bank* v. *Broom* [1], the Vice Chancellor observed "It appears to me that, when the plaintiffs demanded payment of their debt, and, in consequence of that application the defendant agreed to give certain security, although there was no promise on the part of the plaintiffs to abstain for any certain time from suing for the debt, the effect was, that the plaintiffs did in effect give, and the defendant received, the benefit of some degree of forbearance; not, indeed, for any definite time but at all events, some extent of forbearance." This case was followed in *Fullerton* v. *Provincial Bank of Ireland* [2] in which Lord Macnaghten said :— "In such a case as this it is not necessary that there should be an arrangement for forbearance for any definite or particular time. It is quite enough if you can infer from the surrounding circumstances that there was an implied request for forbearance for a time, and that forbearance for a reasonable time was in fact extended to the person who asked for it." Similar observations occur in the judgments of Vaughan Williams and Fletcher Moulton L. JJ., and of Parker, J., in *Glegg* v. *Bromby* [3].

On these principles it is clear that the learned District Judge's decision being based on a refusal to recognise an act of forbearance on the part of the creditor, which was not for a definite period, cannot be supported.

On the appellant's behalf reliance is also placed on the words of S. 58 of the Transfer Property Act defining mortgage as a transfer of interest 'for the purpose of securing the payment of money *advanced or to be advanced* by way of loan, an existing or future debt," and it is argued that Ex. C is a mortgage. The document describes itself as a security bond, and I think it amounts to a charge on immoveable property, but in the view I have taken, it becomes unnecessary to decide whether

1. (1864) 2 Dr. and Sm. 289=62 E. R. 631 2. (1903) A. C. 309.
3. (1912) 3 K. B 474.

Srinivasa Raghava Aiyangar v. Ranganatha Aiyangar.

Spencer, J.

it is a mortgage, involving thereby a transfer of interest in property, or a mere charge.

The 2nd defendant claimed to be a *bona fide* purchaser for value without notice and the 4th issue relates to the questions raised by this claim. Assuming that he has no notice of the charge created in favour of Aramudachari, although he must have known of it before his sale-deed was registered on 13th June 1914, as it is mentioned in the security bond (Ex. II) given to him on 31st March and it has been found that he and Aramudachari are next door neighbours, still this would not help him to avoid Ex. C for if Aramudachari took a *bona fide* charge on this same property for consideration on 6th December, 1913, the subsequent sale to 2nd defendant on 2nd March 1914, must be subject to that charge.

I would allow this appeal and would give the plaintiff a decree for sale of the property which is the subject of the charge with costs throughout and I would direct second defendant to bear his own costs in all the Courts. Time for sale is 3 months from this date.

Sadasiva Aiyar, J.

Sadasiva Aiyar, J. :—I entirely agree throughout. The decree we pass for sale, is of course, intended to award to the plaintiff a relief additional to the relief he has obtained against the 1st defendant personally. As the 1st defendant has not opposed the plaintiff's claim, he will not be liable personally for the plaintiff's costs here and in the lower Appellate Court.

The question whether the security bond created a simple mortgage or a mere charge is a difficult one which it is unnecessary to decide as pointed out by my learned brother. (See *Jawahar Lal* v. *Indiomati* [1] where two learned Judges differed as to the construction of the bond in question therein. The language of the bond in that case was, however, weaker than that of the security bond before us.)

As regards S. 40 of Act IV of 1882, an obligor who executes a bond creating a charge on *specific* immoveable property does, in my opinion, transfer an interest therein and the obligee is entitled to an interest in the property and not merely to the benefit of an obligation annexed to the obligor's ownership of immoveable property within the meaning of S.40 of Act

1. (1914) I. L. R. 36 A. 201.

Srinivasa Raghava Aiyangar v. Ranganatha Aiyangar. — Sadasiva Aiyar, J.

IV of 1882. The "obligation" contemplated in that section is a personal obligation correlative to a personal right in the obligee such as a right to obtain a mortgage-deed or a sale-deed (which deed, it is, that transfers the interest contracted to be transferred). The subsequent purchaser from a man who has already created a valid charge is as much bound by it as the creator himself on the same principle that the subsequent purchaser for valuable consideration from a simple mortgagor is bound by the mortgage, the question of actual notice to him being immaterial. (See *Cooling* v. *Saravana* [1]).

As regards the distinction between a mortgage and a charge it seems to me that every mortgage document creates also a charge but, conversely, a charge may not amount to a mortgage in all cases. That, in some cases a document creating a charge may be a mortgage document is implied in the language of S. 100 of the Transfer of Property Act itself, defining a charge. Where it is created *by law* and not by act of parties, it is of course not a mortgage as the definition of a mortgage under S. 58 contemplates the creation of the mortgage by the intentional act of a private person called the mortgagor who transfers the mortgage interest in favour of the mortgagee.

The distinction between a charge and a simple mortgage is oftentimes very difficult to appreciate. Where no personal covenant to pay the borrowed money is found in the deed which creates the charge it is probably not a simple mortgage according to the trend of the decisions. Where, however, the charge is created over *specific* immoveable property, I am inclined to hold that though it may not be a simple mortgage owing to the absence of a personal covenant to pay, it is still a mortgage, though of the anamolous kind mentioned in S. 98 of the Act (Act IV of 1882). Where the immoveable property is not described in a definite manner, then the transaction may create merely a charge and not a mortgage as S. 100 of Act IV of 1882 uses the general expression "immoveable property" and not the expression "*specific* immoveable property" found in S. 58 of Act IV of 1882.

The result, as I said before, is that S. 40 of Act IV of 1882 does not apply and the principle of the decision in *Cooling* v. *Saravana* [1] does apply to the document we have to construe

1. (1888) I. L. R. 12 M. 69.

Srinivasa Raghava Aiyangar v. Ranganatha Aiyangar.

Sadasiva Aiyar, J.

in the present case. I am inclined to think, with great respect, that the decision in *Royazuddi Sheik* v. *Kalinath Mookerjee* [1], takes a too narrow view of the effect of a document creating a charge on specific immoveable property and I hold that even where there is no personal covenant to pay, the document creating such a charge, is a mortgage and not a mere charge liable to be defeated by a subsequent mortgage-deed or sale-deed, though executed in favour of a *bona fide* transferee for consideration without notice.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE AYLING AND MR. JUSTICE KRISHNAN.

Sivaramalinga Dikshatar ... *Appellant** (*Plaintiff.*)

v.

Sabharathna Dikshitar and others ... *Respondents* (*Defendants 1, 2 and 4 to 15.*)

Sivaramalinga Dikshatar v. Sabharathna Dikshitar.

Specific Relief Act S. 42, proviso Scope of—'Further relief', meaning of—Suit by a suspended trustee and archaka of a temple for declaration of the illegality of an order of suspension and for an injunction—Plaintiff not entitled to present possession of temple properties—Prayer for possession if essential - Dismissal of the suit on the pleadings if justifiable.

A Court should not throw out a suit on the ground that it is barred by the proviso to S. 42 of the Specific Relief Act unless it is quite clear that the plaintiff ought to seek further relief which he has failed to claim

Aisa Siddika v. *Bidhu Sekhar* [2], Referred to.

The further relief referred to in the proviso to the section is such relief as flows directly from the declaration sought for and such as a plaintiff would be able to claim in an ordinary suit by virtue of the title sought to be declared.

Abdulkader v. *Mahomed* [3] Referred to.

Plaintiff was one of the holders of the combined office of archaka and trustee of a temple and as such entitled to the right of performing puja for 5 days once in every 9 months and to the custody of the moveables of the temple along with 19 others for a period of 6 months once in 6 or 7 years, by rotation. Owing to differences between the plaintiff and the defendants, the other archaka-trustees, the latter passed a resolution suspending him from his office until he paid a fine of Rs. 300. Plaintiff brought a suit alleging that as a result of this resolution he had been obstructed in the exercise of the rights and duties of his office and enjoying the emoluments and privileges attached to it and that the resolution was illegal and inoperative and praying for an injunction restraining the defendants from interfering with him in the exercise of his office. Plaintiff also claimed joint possession of the

* S. A. No. 438 of 1917. 28th August 1918.

1. (1906) I. L. R. 33 C. 985. 2. (1912) 17 C. L. J. 80, 83. 3. (1891) I. L. R. 15 M. 15.

Sivaramalinga Dikshatar v. Sabharathna Dikshitar.

office along with the defendants. It was admitted that at the date of the suits, plaintiff was not entitled to the present possession of the temple properties. The courts below dismissed the plaintiff's suit on the ground that as he was excluded by the defendants from the office of *Dharmarkartha* he ought to have sued for the possession of the temple and its properties as a consequential relief flowing from the declaration and that the suit was not maintainable without a prayer for such relief. *Held*, that the suit, as framed, was maintainable and the plaintiff was not bound to ask for possession of the temple or its properties.

Vengan Poosari v. *Chinnu* [1] *Ratnasabapathi Pillai* v. *Ramaswami Iyer* [2], *Ramados* v. *Hanumantha Rao* [3] Distinguished.

Second Appeal against the decree of the District Court of South Arcot in A. S. No. 184 of 1915, preferred against the decree of the Court of the Temporary Subordinate Judge of Cuddalore in O. S. No. 53 of 1914.

T.R. Venkatarama Sastri for *The Hon'ble Mr.T.Rangachariar* and *S. Muthiah Mudaliar*, for Appellant.

K. Bhashyam Aiyangar and *N. Kunjithapatham Aiyar*, for Respondents.

The Court delivered the following

Judgment:—The Lower Courts have dismissed the plaintiff's suit without any trial holding that it was not maintainable under the Specific Relief Act without a prayer for the possession of the temple and its properties jointly with the defendants. Though a preliminary issue was framed on the point no evidence was given or taken and the question was disposed of solely on the pleadings; we have therefore to decide the question on the same materials.

In this plaint the plaintiff states that he is one of the Dikshitars, who are holders of the combined offices of archaka and dharmakartha in the plaint temple, and that as such he is entitled according to the usage of the temple to the right of performing puja for five days once in every 9 months and along with 19 others to the custody of the idols, jewels and other valuables of the temple for 6 months by rotation (apparently once in 6 or 7 years). He states that in 1909 on account of a dispute as to the ownership of a certain plot of land the body of Dikshitars passed a resolution directing him to deliver it up to the temple and inflicted a fine of Rs. 300 on him and suspended him from his office till he obeyed their orders. He complains

1. (1903) 14 M. L. J. 290. 2. (1910) I. L. R. 33 M. 452.
3. (1911) I. L. R. 36 M. 364.

Sivaramalinga Dikshatar v. Sabharathna Dikshitar.

that as a result of this resolution he has been obstructed in the exercise of the rights and duties of his office and prevented from enjoying the emoluments and privileges attached to it. He claims that the resolution is illegal and inoperative and prays for a declaration to that effect and also for an injunction restraining the defendants from interfering with him in the exercise of his office. He further claims damages for the loss of emoluments caused by the wrongful obstruction of the defendants and for the loss of his reputation, in all Rs. 1,600. The only objection the defendants took to the frame of the plaint in their written statement was that plaintiff should have asked for the possession of his office as well. Plaint was thereupon amended to add a prayer for the joint possession of the office. The above is a brief summary of the material allegations and prayers in the plaint with reference to the point we have to consider.

On this plaint the lower Courts have held that as plaintiff was excluded by the defendants from the office of dharmakartha he ought to sue not only for a declaration that the defendant's act was wrongful but also for the possession of the temple and its properties as consequential relief flowing from the declaration: and relying mainly on the observations of Subrahmania Aiyar, J., in *Vengan Poosari* v. *Patchamuthu* [1], and on the rulings in *Abdul Kadar* v. *Mahomed* [2], and *Rathnasabapathi Pillai* v. *Ramasami Aiyar* [3], and distinguishing the case in *Ramadoss* v. *Hanumantha Rao* [4] they have held the suit to be not maintainable under S. 42 of the Specific Relief Act without such a prayer. On the facts of this case we are unable to support that view.

We agree with Mookerjee, J., in thinking that a Court should not throw out a suit on the ground that it is barred by the proviso to S. 42 unless it is quite clear that the plaintiff ought to seek further relief which he has failed to claim. See *Aisa Siddika* v. *Bidhu Sekhar* [5]. The further relief the section speaks of is such relief as flows directly from the declaration sought for and such as a plaintiff will be able to claim in an ordinary suit by virtue of the title sought to be declared. This is the view taken in *Abdul Kadar* v. *Mahomed* [2]

1. (1903) 14 M. L. J. 290.
2. (1891) I. L. R. 15 Mad. 15.
3. (1910) I. L. R 33 Mad. 452.
4. (1911) I. L. R. 36 Mad. 364.
5. (1912) 17 C. L. J. 80, 38.

Sivaramalinga Dikshatar v. Sambharathna Dikshitar.

and we accept it. Such further relief will necessarily depend on the facts of each case. Is it clear then that in the present case on the declaration asked for being granted the plaintiff will become thereby entitled to the joint possession of the temple and its properties and that he should be compelled to seek that relief and pay court fees on their value which is said to be about Rs. 35 lakhs. We do not think so. Plaintiff's right to the trusteeship is not denied and he is not seeking to establish it in the present case. He sues to declare the invalidity of a conditional order of suspension against him under which he has been excluded from the performance of duties of his office and from the enjoyment of its perquisites till he paid a fine of Rs. 300 and delivered over a plot of land to the temple. The direct result of the declaration will be that plaintiff will be entitled to recover the office and the emoluments that he has lost in consequence of the wrong order and to prevent interference with him in the future in the discharge of his duties. He has prayed for all these consequential reliefs. It is not at all clear that the setting aside of the order of suspension will in any way affect the position of the temple and its properties. There is no allegation in the plaint or in the written statement about the lands belonging to the temple; they are said to be in the possession of persons who look after the lighting of the temple in return. The temple building and the jewels and valuables were on the date of suit according to the usage of the temple in the custody of a body of 20 persons of whom plaintiff was not one. The declaration therefore will not give plaintiff any right to the present possession of the temple or its properties. As to plaintiff's right to possession when his turn comes the declaration by itself will be sufficient relief as the persons in possession must be taken to be holding the properties on behalf of all the rightful trustees. In considering this question the District Judge says that this view ignores plaintiff's right to the subsidiary offerings when he is not doing his *morai* or turn of worship and does not take account of his right to vote on the question whether the bids for the leases of the offerings should be accepted or not. These are clearly irrelevant considerations on the question of possession of the temple and its properties. The injunction and damages plaintiff asks for are the proper relief to secure such rights. We must therefore hold that in the circumstances of this case plaintiff is not bound to

ask for joint possession ; indeed he is not entitled to it and the dismissal of his suit for not asking for such relief is erroneous.

The cases chiefly relied on by the lower Court and by the learned vakil for the respondents are all clearly distinguishable. None of them dealt with the case of suspension of dharmakartha or with circumstances, such as we have here of the possession of the temple and its properties being held not by all the trustees but by a few of them at a time in rotation, plaintiff not being entitled to it at the time of the suit. In the case in *Vengan Poosari* v. *Patchamuthu* [1] it appears that the plaintiff was entitled to the joint possession of the temple but the defendant prevented him from having acceses to it by keeping it under lock and key. In *Abdul Kadar* v. *Mahomed* [2] defendant was in possession of the properties which possession if plaintiff's case was established would be that of a trespasser. The case most relied on by the respondents is the one in *Rathnasabapathi Pillai* v. *Ramasami Aiyar* [3] but that was a case of a trustee who had been dismissed from his office and had actually been ousted from possession of the temple properties by the defendants; that ruling also is thus distinguishable from the present case. The case which seems to us to be nearest to the present case is the one in *Ramados* v. *Hanumantha Rao* [4]. The District Judge distinguished it on the ground that the tenants in possession were willing to recognise whomsoever was holding the office of dharmakartha, whereas he says we have here the determined opposition of the whole body of dikshitars. That opposition however was only to the order of suspension being cancelled as invalid and not to the giving of the custody of the properites to the plaintiff in his proper turn if the Court set it aside as illegal or the plaintiff complied with the condition. The distinction drawn is therefore not valid, as here also the persons in actual possession were holding on behalf of all the rightful trustees. In this case as in that a substantial value has been put on the injunction. If, as the defendants contend, the prayer for the recovery of the office has not been properly valued it will be for the trial Court to consider it, but it does not affect the question before us. That

1. (1903) 14 M. L. J. 290. 2. (1891) I L. R. 15 Mad 15.
3. (1910) I L R. 33 Mad 452=20 M. L. J 301.
4. (1911) I L R. 36 Mad. 364=21 M. L. J. 952.

Sivaramalinga Dikshatar v. Sambharathna Dikshitar.

case therefore supports the view that the present suit is maintainable without a prayer for possession.

The learned vakil for the respondents also cited to us the case in *Appu Pillai* v. *Perumal Pillai* [1] and contended that it was an authority for holding that the fact that the Court was not in a position to place the plaintiff in possession of the property at the date of the hearing on account of an arrangement as to management under which the defendant was to remain in possession was not material in considering the applicability of the proviso to S. 42. We do not think that any such general proposition has been laid down by that case. As a matter of fact the question there was whether a declaration alone could be asked for in second appeal because the right to possession had ceased by them, whereas both in the suit and in the appeal possession had been asked for. It was held that it could not be, but there is no discussion of the reasons. The prayer in Second Appeal must ordinarily have reference to the prayer in the suit and the circumstances that existed then. It is probably for this reason the bare declaration was disallowed in second appeal. The case certainly cannot be treated as an authority for the respondent's contention before us. If on the declaration being given a plaintiff is not entitled to possession he is not bound to ask for symbolical possession under S. 42.

The appellant's vakil relied on the ruling in *Kunj Bihari* v. *Keshavlal Hiralal* [2] in which it was held that a person suing to get himself declared the proper trustee of a religious institution need not ask for the possession of the trust properties but it was sufficient for him to ask for an injunction against the defendant. This view has been dissented from in *Rathnasabapathi Pillai* v. *Ramasami Aiyar* [3] ; but we observe that the late Chief Justice has, in his judgment in *Ramadas* v. *Hanumantha Rao* [4] accepted the view that the ownership of the trust property is in the idol as a judicial person and not in the trustee and it may therefore be a question whether when the person in possession of the property holds it on behalf of the idol and the plaintiff does not dispute his right to do so a prayer for joint possession should be insisted upon. But in this case we need not express any opinion on that question.

1. (1912) 23 M. L J. 118.
2. (1904) I. L. R 28 Bom. 567.
3. (1910) I. L R. 33 Mad. 452.
4. (1911) I.L R. 36 Mad. 364.

Sivaramalinga Dikshatar v. Sambharathna Dikshitar.

The lower Court's decree must be set aside and the suit remanded to the first Court for disposal according to law. Defendants will pay plaintiff's costs here and in the lower Appellate Court; costs in the first Court to abide and follow the result.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ABDUR RAHIM AND MR. JUSTICE SESHAGIRI AIYAR.

Vatavatta Nair ... *Appellant* * (*1st Defendant*)

v.

Kenath Puthen Vittil Kuppassan Menon (the first respondent is also the legal representative of the deceased, 2nd respondent *vide* order, date, 6th February 1918 on C. M. P. No. 188 of 1918) and another. *Respondents* (*Plaintiff and 2nd Defendant*).

Vatavatta Nair v. Kenath Puthen Vittil Kuppassan Menon.

*Malabar Law—Karnavan—Renewal of kanom before expiry of the original term —Necessity or benefit to the tarwad—*Bona fide *enquiries by alienee—Proof of.*

A melcharath granted by a Karnavan before the expiry of the term of the kanom will be binding on the tarwad only on proof of necessity or benefit to the tarwad.

The same principle applies to the grant of a renewal of a kanom before the expiry of the original term.

Raman Nambiar v. *Raman Nambiar* [1] *Cheriya Cheri Kandan* v. *Krishnan Nambiar* [2], *Mohideen Kutti* v. *Kunhi Koya* [3] applied.

If actual necessity for the renewal is not proved, the alienee can succeed only on proof that he made such inquiries as would bring the case within the rule laid down in *Hanuman Pershad's case* [4]. It is not enough for the alienee to show that he made enquiries of the Karnavan and was satisfied with the statements made by him as to the existence of a necessity for the renewal.

Appeal against the decree of the Court of the Subordinate Judge of South Malabar at Palghat, dated 26th March 1917, in O. S. No. 33 of 1915.

C. V. Ananthakrishna Aiyar and *P. S. Narayanaswami Aiyar* for Appellant.

T. R. Ramachandra Aiyar and *A. Sivarama Menon* for Respondents.

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* A. S. No. 289 of 1917. 8th April 1918.

1. (1914) 27 M. L J. 175.
2. (1912) 27 M. L. J. 690.
3. (1914) 27 M. L. J. 691.
4. (1856) 6 M. I. A. 393.

Vatavatta Nair v. Kenath Puthen Vittil Kuppassan Menon.

Abdur Rahim, J.

The Court delivered the following :

Judgments:—*Abdur Rahim, J.*—The plaintiff in the suit from which this appeal has been preferred is the senior anandravan of the tarwad of which the 2nd defendant is the karnavan. The 1st defendant holds a kanom, Ex. II in the case, executed on the 24th August 1914. The object of the suit is to have that kanom set aside on the ground that it was an imprudent transaction and was injurious to the interests of the tarwad. The 1st defendant who is the karnavan of a rich tarwad has had dealings with the 2nd defendant's tarwad for a long time prior to the suit. He holds kanoms and melcharaths on large properties belonging to the 2nd defendant's tarwad including the property in dispute.

In order to understand the questions arising in the case it is necessary only to go back to Ex. XX which is a melcharath in favour of the 1st defendant in respect of the property comprised in Ex. II executed in May 1916. The melcharath therefore, which is a sort of second charge, would expire in 1908. In 1902 the 2nd defendant's predecessor executed in favour of the 1st defendant's predecessor a puramkadom—that is a second charge—on receiving a fee of about Rs. 1,350. That document contains a stipulation for renewal of the melcharath Ex. XX. Then, disputes arose between the parties not merely with respect to this property but also with respect to properties belonging to the 2nd defendant's tarwad in possession of the 1st defendant. A notice was given by the 2nd defendant in 1914 to the 1st defendant asking the latter to surrender the property comprised in Ex. XX. There had been two suits instituted with respect to other properties of the 2nd defendant's tarwad in possession of the 1st defendant. All these disputes, it appears, were arranged to be settled by the mediation of certain pleaders practising at the Palghat Bar, and in the result, Ex. II and Ex. III were executed. It appears that altogether Rs. 3,000 was paid by the 1st defendant to the 2nd defendant out of which Rs. 1,000 was the fee for renewal. The case of the plaintiff is that Ex. II is a renewal of Ex. XXI which was to expire only some time in 1920.

It was strongly contended by Mr. Ananthakrishna Aiyar for the appellant that we must ignore Ex. XXI altogether as that was disputed by the parties and as Ex. II. was executed

Vatıvatta Nair v. Kenath Puthen Vittil Kuppassan Menon.

Abdur Rahim, J.

under an arrangement arrived at by way of compromise. But the whole case tried before the Court was that Ex. II was executed before the expiry of the term mentioned in Ex. XXI and therefore it was invalid unless the 1st defendant was able to show that the transaction was for the benefit of the family or was entered into for a necessary purpose. The document, Exhibit II, itself states that, "Though a period of 5 years and 8 months has yet to expire of the former puramkadom demise for 12 years (meaning thereby Ex. XXI), yet we have to-day given you this demise for 12 years as we are pressed for payment of the amount on the pronote with interest thereon executed to M. K. Krishna Menon." The written statement of the 1st defendant, paragraph 9, also proceeds on the same basis and the evidence of the 1st defendant himself is to that effect. And the question raised by the first issue, the issue bearing on the point, "whether the demise Ex. II was valid and binding on the tarwad in view of the fact that the 1st defendant has surrendered his prior demise before he took this demise." By the prior demise here is meant the puramkadom Ex. XXI. I think it would be altering the entire case if we were now to accede to Mr. Ananthakrishna Aiyar's contention that Ex. XXI must be ignored altogether and that we must hold that since the term in Ex. XX expired in 1908 Ex. II should not be treated as a transaction entered into before the expiry of an existing demise.

Mr. Ananthakrishna Aiyar has next argued that since there were disputes between the parties as to the validity of Ex. XXI and also about other transactions and as Ex. II was executed in settlement of those disputes no question of necessity or benefit to the tarwad arises in connection with Ex. II at all. But the suit raises the question not whether Ex. II is binding on the 2nd defendant but whether it binds the tarwad of which the 2nd defendant is the karnavan. Ex. II was executed long before the expiry of the term of Ex. XXI. The contention on behalf of the plaintiff is that the 1st defendant must prove either necessity or benefit to the tarwad. I do not think that the fact that the 2nd defendant executed Ex. II under the mediation of some persons would, by itself, relieve the 1st defendant in the circumstances of the case from making out that this is a transaction which is binding on the tarwad. The defendant did

Vatavatta Nair v. Kenath Puthen Vittil Kuppassan Menon

Abdur Rahim, J.

not attempt to make a case before the trial Court that the transaction should be upheld on the ground that it was part of the terms of a *bona fide* settlement of disputes. If he had set up such a defence the nature of the entire dispute would have to be looked into. All facts which will show that it was a *bona fide* settlement should have been placed before the Court.

It has been ruled in more than one case that if a melcharath is granted before the expiry of the term of the kanom the melcharath-holder must prove necessity or benefit to the tarwad. See *Raman Nambiar* v. *Raman Nambiar* [1], *Cheria Cheri Kandan* v. *Krishnan Nambiar* [2] and *Moidin Kutti* v. *Kunhi Koyan.* [3] In the first two cases Sundara Aiyar and Sadasiva Aiyar, JJ., who had considerable experience of Malabar Law and litigation took part. In fact Mr. Ananthakrishna Aiyar has not seriously contended that those rulings are wrong. But his agrument, upon which he has insisted a great deal, is that the rule regarding the grant of a melcharath has no application to the renewal of a kanom. A melcharath is what is granted to a person other than the Kanomdar or tenant while if a kanom is renewed to the holder of the kanom himself, that is a case of renewal. The ground upon which the rule relating to melcharath has been based is two-fold: firstly, if a karnavan grants a melcharath before the expiry of the term of the kanom he is practically fettering the discretion of the person who may hold the office at the time of the expiry of the kanom; secondly it is not possible always to ascertain beforehand what would be fair and reasonable terms for the melcharath before the kanom has expired. Both these considerations seem to apply with equal force in the case of renewal *i. e.*, where a kanom is renewed before the expiry of its term. Mr. Ananthakrishna Aiyar argues that there is no rule prohibiting the surrender of a portion of the term of a kanom and that in fact such a surrender would be beneficial to the tarwad. I am not prepared to say that the surrender of a portion of the term must necessarily be beneficial to the tarward; but even supposing it to be so, the grant of another kanom which would expire after the date of the expiry of the term of the original kanom would come within the purview of the ruling relating to melcharath and the same

1. (1914) 27 M. L. J. 175. 2. (1914) 27 M L J 690. 3. (1914) 27 M. L. J. 691.

Vatavatta Nair v. Kenath Puthen Vittil Kuppassan Menon.

Abdur Rahim, J.

considerations would apply. The question shortly put is, why should a karnavan be in a hurry to renew a kanom before its term expires? If he can show that there was necessity to renew the kanom at that stage or that it was for the benefit of the tarwad that he should do so, that should be sufficient justification. I think, therefore, that the principle of the rulings above cited applies to this case, and this is also the view of the Subordinate Judge who is presumably familiar with the Malabar Law.

Then remains the question whether Ex. II is a valid transaction. The 1st defendant has not been able to prove actual necessity, but his real case has been that he made *bona fide* enquiries before obtaining Ex. II andt hat he was satisfied after such enquiry that necessity existed for the transaction in question. What are the exact limits of the enquiry which a person obtaining a transfer or advancing money to a person in the position of a karnavan whose position is very much analogous to that of a manager of an ordinary Hindu family, is required by law to make are not capable of being defined for all cases. But I think it is amply clear from the authorities that it is not owing enough for the alienee to show that he made enquiries of the karnavan himself and that he was satisfied with the statements made by him. If that was all that was wanted there would be hardly any case in which it would not be possible for the alienee to satisfy the letter of the law. In *Kameswar Pershad* v. *Run Bahadur Singh,* [1] Sir James Colvile delivering the judgment of the Judicial Committee says that: "Their Lordships in no degree depart from the principles laid down in the case of *Hanooman Pershad Pandey* v. *Mussammat Babooee Munraj Koonwarree,* [2] which has been so often cited. They have applied these principles in recent cases not only to the case of a manager for an infant, which was the case there, but to transactions on all-fours with the present, namely, alienations by a widow, and to transactions in which a father, in derogation of the rights of his son under the Mitakshara Law, has made an alienation of ancestral family estate." The principle broadly laid down is, that although the lender is not bound to see to the application of the money, and does not lose his rights if, upon a *bona fide* enquiry, he has been deceived as to the existence of the necessity which he had reasonable

1. (1880) I. L. R. 6 Cal. 843.   2. (1856) 6 M. I. A. 393.

Vatavatta Nair v. Kenath Puthen Vittil Kuppassan Menon.

Abdur Rahim, J.

grounds for supposing to exist, he still is under an obligation to do certain things. The words of the judgment in that case are, "Their Lordships think that the lender is bound to enquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate; but they think that if he does so inquire, and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and they do not think that, under such circumstances, he is bound to see to the application of the money." .... "Their Lordships do not think that a *bona fide* creditor should suffer when he has acted honestly and with due caution, but is himself deceived." The same principle was applied in *Ravaneshwar Prasad Singh* v. *Chandi Prasad Singh* [1] which was confirmed by the Privy Council on appeal. At page 751, it is pointed out that the enquiry was wholly insufficient and could not be said to be *bona fide* on the ground, among others, that the Maharaja of Dharbhanga, who was the alienee there, merely satisfied himself with the enquiries made of his servants and did not make enquires of the creditors and the heirs, and that it was not sufficient merely to ask the debtor if he was borrowing for necessity and to be satisfied with his answers. In this case it is alleged that there was a debt of Rs. 3,000 outstanding on a promissory note executed by the 2nd defendant to one Kutti Krishna Menon. The evidence is that the 1st defendant and his pleader made enquiries of the 2nd defendant as well as of Kutti Krishna Menon. The promissory note was for Rs 3,000 and part of the amount, at any rate, is alleged to have been borrowed for the purpose of repairing a temple belonging to the 2nd defendant's tarwad and for the performance of the purification ceremony after the repairs. This Kutti Krishna Menon is a close relation of the 2nd defendant being his son's first cousin. The note was executed shortly before Ex. II. The 1st defendant is a neighbour of the 2nd defendant and as he had money dealings with him he may well be presumed to have some knowledge of his affairs. Now, the real point as regards this is, that the plaintiff, the senior anandravan

1. (1911) I. L. R. 38 Cal. 721.

Vatavatta Nair v. Kenath Puthen Vittil Kuppassan Menon.

Abdur Rahim, J.

of the tarwad, a few days before the transaction had given a notice (Ex. C.) to the 1st defendant that the 2nd defendant was trying to execute document to the injury of the tarwad and to raise money for the purpose of his own extravagance. He also sent him a notice which he had published in a vernacular paper, and there it was stated that the 2nd defendant wanted to execute a renewal which was not for the benefit of the tarwad nor was there any necessity for it. In spite of these notices, the 1st defendant who is a pleader of considerable experience and standing in the profession, does not think it worth his while to refer to the plaintiff and ascertain how far the allegations made by him were well-founded or not. The repairs of the temple were alleged to have been met by subscription from the tenants and there was no necessity, therefore, for borrowing any money. It ought to have also struck the 1st defendant that Kutti Krishna Menon being a near relation of the 2nd defendant it would be safer to require some independent proof of the *bona fides* of the promissory note. It is difficult to understand why the 1st defendant should have refrained from taking what would appear to anybody, and especially to a pleader, obvious steps for securing his position. He ought to have gone to the plaintiff and ascertained what was the true state of affairs. The tarwad of the 2nd defendant consists of a large number of adult male persons and he ought to have asked some of them whether there was any necessity for the 2nd defendant to raise any money. I think if he had made proper enquiries he would have learnt that the repairs of the temple were met by subscriptions from the tenants and I must hold that he should not have placed implicit reliance on the statement of the 2nd defendant or of Kutti Krishna Menon. I think there is great force in the argument of Mr. Ramchandra Aiyar that this payment of R. 3,000 or of Rs. 1,000 as renewal fee for Ex. II could not have been for purposes of necessity and it was more or less an after thought that struck the 1st defendant to get hold of a promissory note in favour of Kutti Krishna Menon. Kutti Krishna Menon is a wealthy man and his evidence is that he obtained Rs. 60 out of this Rs. 3,000 as consideration for an agreement not to press for the loan. There is absolutely nothing to show any sort of necessity why only a few days afterwards money had to be raised by Ex. II in order to pay off this loan. It

Vatavatta Nair v. Kenath Puthen Vittil Kuppassan Menon.

Abdur Rahim J.

is pointed out by the learned Subordinate Judge that the money alleged to have been repaid to Kutti Krishna Menon was not invested in any better security or to any greater advantage but in fact it was lent to a bank at a lower rate of interest than under Ex. I. I think the conclusion of the Subordinate Judge was amply justified that necessity is not proved or that any benefit accrued to the tarwad from Ex. II. It appears that the 2nd defendant is an old man and it is not at all unlikely, having regard to the fact that there are several tavazhis in this tarwad, that he wasted to enrich his own family at the expense of the tarwad of which he was the karnavan. It seems to me that if the 1st defendant had made proper enquiries he would have found out that there was no necessity whatever for executing Ex. II. On the other hand, it seems to me extremely probable, as suggested by Mr. Ramachandra Aiyar that this transaction was really a term of the settlement of certain disputes with respect to other properties in respect of which suits were pending and that it was not a transaction entered into for purposes of tarwad necessity. As already pointed out, it was not sought to be proved that apart from the question of benefit or necessity, the settlement was binding on the tarwad.

There has been much discussion before us as to the recital in Ex. II in respect of the value of certain improvement amounting to Rs. 400 to Rs. 800 which is made payable along with the mortgage money secured by Ex. II. Those improvements, it is abundantly clear, had already been paid for by the 2nd defendant's tarwad and therefore nothing was due on that account. The 1st defendant when in the witness box gave up this claim, saying at the same time that he was not satisfied that the improvements had been paid for. I think there can be no doubt whatever that the case of the plaintiff on this point is perfectly true and is borne out by Ex. D, the draft of which, Ex. E, was corrected by the 1st defendant himself. It is however possible that at the time of the execution of Ex. II the 1st defendant has forgotten what was stated in Ex. D, and, therefore, it is unnecessary for me to hold that the recital regarding improvments in Ex. II was deliberately false. However in view of my finding that there was no necessity for the execution of Ex. II at all, I do not think it necessary to refer to this part of the case any further. I agree with the finding of the Subordinate Judge that

Vadavatta Nair v. Kenath Puthen Vittil Kuppassan Menon.

Seshagiri Aiyar, J.

Ex. II is not valid and binding on the 2nd defendant's tarwad and the appeal must be dismissed with costs.

Seshagiri Aiyar, J.—I would have simply expressed my concurrence with my learned brother's judgment had it not been for the fact that I am unable to agree unreservedly with what he says regarding the conduct of the 1st defendant. Therefore I shall say a few words on the two questions of law argued by Mr. Ananthakrishna Aiyar with special reference to the conduct of the 1st defendant. I entirely agree in thinking that the document should not be regarded solely as the result of a compromise. There is no issue upon that question. If that question had been raised, there would have been a necessity to go into the evidence as to whether the 1st defendant was acting honestly in putting forward the claim that Ex. XXI is not binding upon the tarwad. Therefore it is not open to the defendants now to set up that case.

Upon the further question argued by Mr. Ananthakrishna Aiyar that there was a surrender of the previously existing kanom and that the renewed kanom which dates from the date of the surrender is not affected by the same mischief which affects a melcharath or renewal which is to take effect on the expiry of the existing kanom, I fail to see how on principle the two questions are different. The reason why melcharaths are discountenanced under the Malabar Law is this: There is an existing contract which the karnavan has made which is binding on the tarwad. It has a particular term to run. It is not, therefore, open to a karnavan to anticipate the term and to get a new contract executed without showing that there was necessity for making a new contract. When the old kanom expires there may be a new man who will be able to apply his mind to the circumstances arising at the end of the period. He may probably think that the old tenant should not be given the kanom again; or he may also think that it would be necessary in the interests of the tarwad that fresh terms should be imposed upon the old tenant. Therefore it is not ordinarily open to a karnavan to anticipate what is going to happen some years after. It is a well-known fact in Malabar that Melcharaths and renewals are given mostly in the personal interests of the karnavan for the time being who is anxious to enrich himself at the expense of the tarwad. Those are the grounds on which these transactions have been discountenanced by courts and I fail to see how the fact that

there is a surrender of the existing period and the kanom is made to date from the date of the surrender could make any difference in the principles to be applied. Therefore I agree with my learned brother in thinking that, as in this case there was some time still to run for Ex. XXI, the fact that the period was surrendered and a new kanom was taken on that date, should not make any difference in considering the question.

Vatavatta Nair v. Kenath Puthen Vittil Kuppassan Menon.

Seshagiri Aiyar, J.

Upon the second question I do not go the whole length which my learned brother has gone. I see nothing in the conduct of the 1st defendant to show that he has not been acting honestly and *bona fide*. In my opinion he has been mistaken in judging of his rights and duties. There were two suits, one in which he was himself the plaintiff and the other in which he was the defendant. A notice had been given by the second defendant impeaching the validity of the Kanom by his predecessors ; in these circumstances, the 1st defendant asked his own vakil and the vakil for the 2nd defendant to settle the dispute between the parties. He apparently relied upon their mediation and entered into this arrangement. Now, it may be that he felt himself very sure of his position and did not make any further enquiries. But I do not think it can be said that he shirked any enquiry or acted otherwise than honestly in this matter. In my opinion the evidence which has been given is entirely to his credit, and there is nothing suggested in the cross-examination to show that he was acting fraudulently or was not behaving properly towards the 2nd defendant who is said to be an old man. After all it must be remembered that the 1st defendant, although a vakil, was acting in the interests of his own tarwad which he was bound to protect. In these circumstances I am not prepared to say that he was acting otherwise than honestly and *bona fide* in conducting the negotiations. At the same time I am prepared to agree with my learned brother that the enquiry which he instituted was not sufficient in the eye of the law to justify the transaction. As has been pointed out by my learned brother, at the time of the transaction two notices were sent to the 1st defendant, Ex. C and Ex. L. Ordinarily it would be enough for a lender to be satisfied that there is a pre-existing debt, for if a lender is to be compelled to find out that that debt also was one contracted for necessity, and if that is to be insisted upon in

Vetavatta Nair v. Kenath Puthen Vittil Kuppassan Menon. Seshagiri Aiyar, J.

the case of each loan, the result would be that the lender would have to go back a number of years and to investigate the affairs of the family from the outset. I do not think that is what the law requires of him to do. None the less when the 1st defendant had the notices from the 2nd plaintiff that the money he was going to lend to the 2nd defendant was for the latter's personal use and would not bind the tarwad, it was his duty to have gone to that person and made enquiries as to whether the representations made in the notices were true or not. His failure to make further enquiries was certainly wrong and certainly not legally justifiable; I think *Ravaneshwar Pershad Singh* v. *Chandi Prasad Singh* [1] lays down the principles applicable to the present case. I do not understand the decision to rule that, in all cases where a man is lending to pay off a pre-existing debt, the lender must not only satisfy himself that there is a debt but that the debt is also one binding on the family. As I said before, in my opinion the 1st defendant apparently believed that the mediation of the two vakils was sufficient to enable him to lend the money; I do not think that he can be said to have acted dishonestly or not to have acted *bona fide* in having taken the renewal.

As regards the question about the insertion of the further charge in the document for improvement, the same remarks would apply here also. I am unable to agree with Mr. Ramachandra Aiyar that there was anything sinister in the conduct of the 1st defendant in getting this provision for a further charge inserted in Ex. II. The first document which he attested (Ex.D) was in 1898 and 16 years later he took this document Ex. II, from the 2nd defendant after the mediation of the two vakils. He says that he was under the impression that the money was not paid and he has sworn to the fact that his karnavan Thoppan Nayar did not receive the money. I see no reason for not believing the evidence given by him in the witness box. It is unnecessary to pursue this subject further because in my opinion if the matter rested only with Ex. II I would have come to the conclusion that the two transactions were entirely separable. But as I have come to the conclusion that no necessity or benefit to the tarwad is proved by the 1st defendant in respect of Ex. II it is unnecessary to say whether the 2nd clause should be regard-

1. (1911) I. L. R. 38 C. 721.

ed as a clog on the equity of redemption and whether it would be valid and binding upon the tarwad.

Vatavatta Nair v. Kenath Puthen Vittil Kuppassan Menon.

I agree in the conclusion come to by my learned brother that the appeal should be dismissed with costs.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SADASIVA AIYAR AND MR. JUSTICE NAPIER.

T. R. Rama Krishna Naidu and another. ... *Appellants.* * (*Defendants. Nos 1 to 3.*)

v.

S. V. Krishnaswmi Naidu (dead) and another. ... *Respondents.* (*1st Plaintiff, 4th defendant legal representatives of the 2nd plaintiff and legal representative of the 1st plaintiff.*)

Rama Krishna Naidu v. Krishnaswami Naidu.

*Civil Procedure Code S.*11 :–Res judicata—*Heard and finally decided—Findings in a suit not necessary for the final decision—Decree in spite of the findings—Findings if and when operate as* res judicata.

The application of the rule of *res judicata* by the Courts should be influenced by no technical consideration of form but by matter of substance

Sheoparsan singh v. *Ramnandan prasad* [1] *Relied on.*

S.11 of the Code of Civil Procedure requires, among other things, that an issue should have been heard and finally decided in the former suit, before the decision there on can be held to bar the trial of the same issue in a subsequent suit. There is no further condition that the decision on the issue should have been the basis of the decree in the prior suit. Where on a consideration of the whole evidence the Court decides certain issues against the defendant but dismisses the suit on another ground, the decision on those issues operates as *res judicata* in a subsequent suit between the same parties unless it is shown that the findings in the previous suit are wholly inconsistent with the decree or other findings therein.

Krishna Behari Roy v. *Bunwari Lall Roy* [2] *Varathayyangar* v. *Krishnaswami* [3] *Relied on.*

Run Bahadur Singh v. *Lucho keer* [4] distinguished.

Parbati v. *Mathura Nath Banerjee* [5] *Nundo Lall Bhuttacharjee* v. *Bedhco Mookhy Debee* [6] *Thakur Magundeo* v. *Thukur Mahadeo* [7] not followed.

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* S. A. No. 750 of 1916. 25th September, 1918.

1. (1916) I. L. R. 43 C. 694 (P. C.)
2. (1875) I L. R. 1 C. 144 (P. C.)
3. (1887) I. L.R. 10 M. 102
4. (1885) I. L. R. 11 C. 301.
5. (1915) I. L.R. 40 C. 29.
6. (1886) I. L. R. 13 C. 17.
7. (1891) I. L. R. 18 C. 647.

Rama Krishna Naidu v. Krishnaswami Naidu.

Second Appeal against the decree of the Court of the Subordinate Judge of Mayavaram in Appeal Suit No. 43 of 1915, (A. S. No. 796 of 1914 on the file of District Court,) preferred against the decree of the Court of the District Munsif of Tanjore in Original Suit No. 308 of 1911.

S. Rangachariar for *G. S. Venkatrama Aiyar*, for the Appellants.

B. Sitarama Rao, for the Respondents.

The Court delivered the following

Sadasiva Aiyar, J.

Judgments :—*Sadasiva Aiyar, J*,—The defendants 1 to 3 are the appellants. The facts are a little complicated. Though the decision of this second appeal ultimately depends upon our opinion on a pure question of law, it is necessary to state the material facts for clearly defining the legal question.

The plaintiff and the defendants are neighbours, the plan Exhibit III showing their respective houses and house sites. Roughly we might say that the plaintiff's house and his vacant site are west and north of the defendant's house and backyard site.

In the plaintiff's vacant site (north of defendants' house and west of the defendants' back yard) there is situated a well marked A which well is common to both the plaintiff and the defendants. In 1905 the plaintiff tried to enclose the well by walls so as to give the defendants access only to the south-eastern half of the circumference of the wall (and not to the remaining north-western half) from the defendant's back door (in the northern wall of the defendants' house) situated to the south-east of the well. The defendants then obstructed the plaintiff and the plaintiff brought the suit O. S. No. 425 of 1905, for an injunction against the defendants' attempted obstruction to the construction of the walls. The plaintiff's allegations in the plaint in that suit were (*a*) that the whole vacant site (within and near the south eastern corner of which the well was situated and including the said well site) belonged to the plaintiff, (*b*) that the defendants had only the right of easement of taking the water from the well and (*c*) that as the owner of the servient tenement, the plaintiff was entitled to put up walls in his own site leaving a convenient way to the defendants to approach the well from their backyard door

(south-east of the well) to the south-eastern half portion of the circumference of the well.

The defendants contended in that suit that the whole vacant site itself including the site of the well belonged to themselves as part of their house. The District Munsif found in that suit that the site did not belong to the Plaintiff but to the defendants, and so dismissed the suit. On appeal, the District Judge was inclined to differ from the District Munsif on the question of title to the vacant site in which the well stood, but he held that the well itself belonged to both parties and hence that "convenience and mutual relations between neighbours" dictated that the plaintiff's suit for an injunction should be dismissed and he therefore confirmed the District Munsif's decree. On Second Appeal, this Court made the following observations in its judgment :

"The District Munsif found that the site did not belong to the plaintiffs and so dismissed the suit. The District Judge has not stated any finding on the question of ownership and though he states his opinion that the defendants' access to the site cannot be obstructed, he does not state any finding as to the legal character of the defendants' right." Then, directions were issued to the District Judge to send up findings on the following issues :

(1) Does the site in question belong to the plaintiffs or to the defendants and have the plaintiffs a right to build a wall as alleged in the plaint ?

(2) Whether the defendants have any right in the site in question, so as to entitle them to prevent the plaintiffs from building the wall ?

The District Judge's findings (in substance) were as follows :—(*a*) that the vacant site except the site of the well itself belonged to the plaintiff; (*b*) that the well and its site belonged in common to both parties ; (*c*) that the defendants' contention that even if they had no ownership right in the surrounding vacant site, they had an easement of right of way, not only from their house (to the south-east) to the whole circumference of the well but also another easement of way along a lane running south to north along the western boundary of the vacant site had not been established, they not having used any such way *as of right*, though they might have been

Rama Krishna Naidu v. Krishnaswami Naidu.

Sadasiva Aiyar, J.

passing across all portions of the vacant site and along the western boundary line into the public lane north of the vacant site, without objection through plaintiff's permissive indulgence. The District Judge finally said that the defendants had as owners of half the well such rights over plaintiffs' vacant site as were necessary for the ordinary use and enjoyment of the well and that such rights would be infringed by the construction of the walls "*as set out in the plaint and schedules*" and that the defendants were therefore entitled to prevent the "*building of walls in the manner proposed.*"

This Court then pronounced the following final judgment: "We accept the finding: though the site round the well is found to be the property of the plaintiffs they are not entitled to build on it so as to obstruct the defendants' access *to the well and to every part of the surrounding wall which is common to the plaintiffs and themselves.* The suit was rightly dismissed and we dismiss the Second Appeal. *As the defendants claimed ownership of the site and the finding is against them on that question,* we dismiss the appeal without costs."

This final judgment of the High Court in the former suit is dated 15th August 1910. Four months afterwards, in December 1910, the plaintiff attempted to raise another wall so as not to infringe the defendants' rights of convenient access from their house to any portion of the circumference of the wall of the well. Then also the defendants obstructed. So he brought the present suit in July 1911 for an injunction and other proper reliefs.

The defendants contended (among all sorts of other defences) (*a*) that the vacant site belonged to them and they were not bound by the finding contra in the former suit; (*b*) that, in any event, the defendants had a right of access to the lane running to the west of the site; and that the plaintiff was not entitled to obstruct by his wall access to that lane; and (*c*) that even if the defendants had the right of access only to the entire circumference of the well, the wall proposed to be built by the plaintiffs would not give them as convenient and full an access to the well as they were entitled to.

This last contention need not be further considered as, before the District Munsif, the parties put in a joint statement

Rama Krishna Naidu v. Krishnaswami Naidu.

Sadasiva Aiyar, J.

that the construction of a wall as mentioned in that joint statement would give the defendants full and reasonable access all round the well. The District Munsif, who ultimately decided the suit (there was at first a judgment against the plaintiff by a previous Munsif, which was upset and the suit was remanded for fresh disposal) held that the contentions (*a*) and (*b*) were *res judicata* against the defendants by the final decision of the High Court in the former suit. He therefore passed a decree restraining the defendants from interfering with the plaintiff's construction of the wall in the manner proposed in the Joint statement. The defendants appealed to the District Court which transferred the appeal to the Subordinate Judge of Mayavaram for disposal. The learned Subordinate Judge dismissed the appeal holding (with the District Munsif) that the defendants were bound by the findings in the former suit namely, (*a*) that the plaintiffs were and the defendants were not the owners of the vacant site around the well ; (*b*) that the defendants had no right of easement of way through that site and along the lane running in the western portion of the site to the public northern street called Kothan Lane.

Before us in second appeal, the legal contentions argued were as follows : (Ground No. 5 in the S A. Memo.) "The Courts below erred in holding that the determination of an unnecessary issue in the judgment in the Second Appeal No. 1225 of 19.7 operated as *res judicata*, when that decision was not the basis of the decree passed by the High Court." (6) "As the High Court dismissed the plaintiff's suit on a different point and in spite of the finding as to the ownership, the law of *res judicata* would not apply." (7) "The Subordinate Judge erred in supposing that the determination of any issue in the previous suit would operate as *res judicata*."

The two findings in the former suit which are in controversy now are (1) the plaintiffs are the full owners of the vacant site including the western lane site ; (2) the defendants have no right of way to and along the lane and they cannot therefore object to the wall as propsed in the joint statement on the ground that though it gave them full access to all portions of the well, it did not give them access to the lane.

So far as ownership in the vacant site is concerned, even accepting as correct the very limited rule of *res judicata*

Rama Krishna Naidu *v.* Krishnaswami Naidu.

Sadasiva Aiyar, J.

contended for by the defendants, the High Court in their final judgment in the former litigation refused the defendants their costs on the express ground that the defendants claimed ownership of the site and the finding was against them on that question. The High Court decision, therefore at least as to costs, was expressly based on that finding as to the ownership of the site and hence that finding is clearly *res judicata* in this suit.

Then comes the more difficult question whether the finding that the defendants have no right of easement to pass along the vacant site to the lane is also *res judicata.* It was first sought to be argued by the appellants that the District Judge himself in the former suit did not give any such finding because he mentioned it only in the 3rd paragraph of his finding and not in the fifth and final paragraph of his finding. I do not think that this argument needs further notice.

Then it was contended that though the District Judge might have given that finding in the former suit, the High Court did not confirm that finding. As we read the judgment of the High Court, however, we entertain no doubt that this Court accepted all the conclusions of the District Court which included not only the finding that the defendants had a right of access to all parts of the wall of the well but also that they had no right of easement of way to and along the western lane.

Having thus cleared the ground, we have left the comparatively simple question for decision, namely, whether when the plaintiff's former suit was dismissed notwithstanding the finding against the defendants that they had no right of easement to pass through the vacant-site to go to the lane, this latter finding is *res judicata* against the defendants in the present litigation.

Numerous cases and elaborate arguments were placed before us by Mr. S. Rangachariar and by Mr. B. Seetharama Rao on either side. I shall deal only with the more important cases.

Mr. Rangachariar relied principally upon an observation in the Privy Council decision in *Run Bahadur Singh* v. *Lucho Koer* [1] and on observations in *Venkatasuryanarayana* v. *Sivasankaranarayana* [2]. Mr. Seetharama Rao relied, on the other hand, principally on the Privy Council case in *Krishna Behari Roy* v. *Bunwari Lall Roy* [3] and upon this

1. (1884) I. L. R 11 Cal. 301 (P.C.) 2. (1914) 17 M. L. T. 85.
3 (1875) I. L. R. 1 Cal 144. (P. C.)

Rama Krishna Naidu v. Krishnaswami Naidu.

Sadasiva Aiyar, J.

Court's decision in *Varathayyangar* v. *Krishnasami* [1]. In *Run Bahadur Singh* v. *Lucho Koer* [2], the facts were as follows:—The plaintiff sued his brother's widow for possession of property on the ground that he and his brother were undivided in interest at the brother's death and that the widow was in unlawful possession as the plaintiff, being the survivor, was solely entitled to the property. Before the suit was brought, there was a succession-certificate-proceeding in which it was held that the two brothers were divided. The widow defended the suit on the plea that her husband and the plaintiff were divided in interest and she claimed a finding in her favour on this question both on the evidence let in by her as to the division and on the legal ground that the finding in her favour as to division in the succession-certificate-proceedings was *res judicata* against the plaintiff. She also relied upon a finding in another suit brought for rent against a tenant which suit was within the cognizance of a District Munsif (who had no authority to try the later suit which was filed in the Subordinate Judge's Court). The Subordinate Judge on the evidence held that the brothers were separate in estate though he decided against her contention that the decisions in the certificate-proceedings and in the suit in the District Munsif's Court were also *res judicata* in her favour. The High Court on appeal upheld her contentions as to *res judicata* in her favour and instead of stopping with that, they went into the evidence and gave a finding on the evidence that the brothers were joint in estate. They however held that as that question was *res judicata* and had to be therefore decided by themselves against their finding on the evidence, they dismissed the appeal.

Then on the final appeal to the Privy Council, their Lordships agreed with the Subordinate Judge and differed from the High Court on the question of *res judicata*. Hence, their Lordships had to go into the merits and on the merits also, they agreed with the Subordinate Judge and differed from the High Court. During the course of their Lordships' judgment, there are two sentences at page 306 as follows: "The widow has not appealed against the decree nor could she because it is in her favour, but she has appealed against the finding of the High Court on the evidence that the brothers were joint in

1, (1886) I. L. R. 10 Mad. 102. 2. (1884) I.L R. 11 Cal. 301 (P.C.)

Rama Krishna Naidu v. Krishnaswami Naidu.

Sadasiva Aiyar, J.

estate." "It may be supposed that her advisers were apprehensive lest that finding should hereafter be held conclusive against her, but this could not be so, inasmuch as the decree was not based upon it but was made in spite of it." I feel bound to state with due respect that taking advantage of these two sentences, several decisions in all the High Courts have tried to whittle down the beneficial doctrine of *res judicata* so as to promote vexatious litigation. It will be seen that in the case before their Lordships though the High Court gave a finding *on the evidence* that the brothers were joint in estate, they *also* gave the exactly opposite finding that the brothers were divided in interest because they thought themselves bound by the doctrine of *res judicata* to give that exactly opposite finding and their decree was rightly based upon this latter finding as to division and ignoring the former finding as to joint interest. Their Lordship's observations when read in the light of this state of facts can only mean that where in spite of an useless finding on the evidence, an exactly opposite finding is arrived at by the same Court *as the basis* of its decree, then the former useless finding can never be *res judicata* in subsequent proceedings. The rule enunciated in some of the decisions of the High Courts that no finding against defendants can ever be *res judicata* under any circumstances if the plaintiff's suit was ultimately dismissed (notwithstanding that finding) goes in my opinion far beyond their Lordship's intentions.

I shall now consider the decision in *Venkatasuryanarayana* v. *Sivasankaranarayana* [1], decided by the Chief Justice and Seshagiri Aiyar, J. In this case, the plaintiff (evidently as reversionary heir) sued for a declaration that the adoption of the defendant by the widow of the last male-owner was invalid. The District Court dismissed the suit as barred by limitation as being brought more than 6 years after the plaintiff had knowledge of the adoption but gave also a finding against the defendant that his adoption was invalid through want of authority in the widow. The defendant appealed against the finding that his adoption was invalid. This Court while dismissing the appeal because it was an appeal against a finding remarked that "it was suggested on appellant's behalf that the finding may operate as *res judicata* against him," but that "there was no

1. (1914) 17 M. L. T 85.

Rama Krishna Naidu v. Krishnaswami Naidu.

Sadasiva Aiyar, J.

foundation for this contention." Then they refer among other decisions to the Privy Council case of *Run Bahadur Singh* v. *Lucho Koer* [1], as authority for their view. In the first place the observation is *obiter* because the real basis of the decision was that no appeal was allowed by the Civil Procedure Code against a mere finding where the decree itself was entirely in the defendant's favour. In the next place, the exact scope of the short observation of their Lordships of the Privy Council in *Run Bahdur Singh* v. *Lucho Koer* [1], (which I have already quoted) has not been discussed in detail and it is, no doubt, true that in some classes of cases at least, a finding against defendants by a Court which finally dismissed the plaintiff's suit on some other ground cannot be relied on as *res judicata* against the defendant in a subsequent suit. The case of *Run Bahadur Sing* v. *Lucho Koer* [1] belongs to one of those classes of cases. In that case the finding relied on, (as to the joint interest of two brothers) was completely nullified by an opposite finding, (as to the division of status between the brothers, based on *res judicata*). That case well illustrates one of the classes of cases in which the finding in the first suit will not constitute the decision *res judicata* in the subsequent suit. *Venkatasuryanarayana* v. *Sivasankaranarayana* [2], belongs to another such class, namely, where the plaintiff is non-suited on the ground of limitation, *res judicata*, mis-joinder, insufficient court fees on the plaint, jurisdiction or a like technical and preliminary ground and yet the court proceeds to give a finding on the merits against defendants to save a remand by the Appellate Court. In these classes of cases also, such findings in the first suit will not be *res judicata if, on appeal, the appellate Court does not itself think it necessary to give its decision on them,* or if in case there is no appeal, it is evident that the first Court did not intend its findings to be final.

At this stage, I might turn to the condsideration of the section itself in the Civil Procedure Code on this point, Section 11 says (omitting the immaterial portions) ; "No Court shall try any issue in which the matter directly and substantially in issue in a former suit between the same parties has been heard and finally decided in a Court competent to try

1, (1884) I. L. R. 11 Cal. 301. 2, (1914) 17 M. L. T. 85.

Rama Krishna Naidu v. Krishnaswami Naidu.

Sadasiva Aiyar, J.

such subsequent suit and has been heard and finally decided by such Court." The only condition (besides conditions not in dispute and irrelevant (to our present subject) imposed by the section to restrict the rule prohibiting a re-trial of an issue (besides the other admitted conditions) is that the issue should have been heard and finally decided in the first suit. There is no further condition that the decision of the issue should have been the basis of the decree. It may be that it should not be wholly *inconsistent with* the decree (this is not the same thing as the decree being in spite of the finding) or with any other finding which is the basis of the decree and which nullifies its effect as in the Privy Council case of *Run Bahadur Singh* v. *Lucho Koer*) [1]. It may also be that an issue should not be held to have been *finally* decided against the defendant when it is clear from the judgment that the Court did not intend it as a final decision on that particular point, such intention being ordinarily presumed where the suit is decided against the plaintiff on a preliminary point as to limitation etc.

In the present case, I have no reasonable doubt that the High Court decided and intended to decide finally in the former litigation that the defendants had no right of access to the lane through the plaintiff's vacant site and such a decision is *res judicata*, and the fact that the plaintiff's suit was dismissed does not prevent the operation of the rule deducible from the plain language of the section in the Civil Procedure Code.

I am aware that there are several Calcutta cases in which it has been broadly laid down that no finding against the defendant is *res judicata* against him where the suit is finally dismissed unless that finding is incorporated in the decree as a declaration of rights and liabilities. I do not intend to consider them all nor the Bombay and Allahabad cases holding similar views and I only wish to state that I respectfully dissent from the decisions in these following particular cases, namely, in *Nundo Lall Bhuttacharjee* v. *Bidhoo Mookhy Debee* [2], in *Thakur Magundeo* v. *Thakur Mahadeo Singh* [3], and in *Parbati Debi* v. *Mathura Nath Banerjee* [4]. I might add that these Calcutta decisions cannot in my opinion be reconciled with the decisions of the same Court in *Niamut Khan* v. *Phadu Buldia* [5] (which was a Full Bench

1. (1884) I. L. R. 11 Cal. 301.
2. (1886) I. L. R 13 Cal. 17.
3. (1891) I. L. R 18 Cal. 647.
4. (1912) I. L. R. 40 Cal. 29.
5. (1880) I. L. R. 6 Cal. 319 (F. B.)

Rama Krishna Naidu v. Krishnaswami Naidu.

Sadasiva Aiyar, J.

decision of five Judges and which was in my opinion, wrongly held in *Nundo Lall Bhuttacharjee* v. *Bidhoo Mookhy Debee* [1] to have been overruled by the observations of their Lordships of the Privy Council in *Run Bahadur Singh* v. *Lucho Koer* [2], in *Khater Mistri* v. *Sadruddi Khan* [3] and *Ekabbar Sheikh* v. *Hara Bewah* [4]. (Sir Lawrence Jenkins, C. J. was a party to the decision in this last case).

I shall now turn to the more important decisions which were relied on by Mr. Seetharam Rao and which, I think, support the view I have taken. In *Krishna Behari Roy* v. *Bunwari Lall Roy* [5] the facts were as follows :—B, as adopted son and heir of G, instituted a suit to set aside certain Putni leases on the ground that they were not binding upon him. The Putni Lessee—defendants raised two pleas namely, (1) that B the plaintiff was not the adopted son and heir of G and (2) that the Putni leases were binding upon him even if he was the adopted son and heir as they were given for a proper and necessary purpose. Then K, the reversionary heir of G, was made a supplemental defendant and he also denied the plaintiff's status as adopted son. The first court found (*a*) that the adoption was true and valid (*b*) that, however, the putni lease was granted for a proper and necessary purpose, and so that Court dismissed the suit. The Putnidars did not appeal, but K the reversionary heir, appealed against the finding as to adoption. According to the present prevailing course of decisions, he had no right of appeal but, anyhow, he appealed and his appeal was unsuccessful and a second appeal to the High Court was also unsuccessful. Then he brought a second suit to set aside the adoption, and it was contended by the adopted son that the finding in the former suit in favour of his adoption was *res judicata* against K. That view prevailed in the lower Courts and also in the Privy Council. Their Lordships of the Privy Council say : It is unnecessary to go at length into the reasons for the decision because those reasons appear in a recent judgment of this Board in the case of *Soorjomonee Dayee* v. *Suddanund Mohapatter* [6]. In that judgment it is said "Their Lordships are of opinion that the term "cause of action" is to be construed with reference

1. (1886) I. L. R. 13 Cal. 17.
2. (1884) I. L. R. 11 Cal. 301.
3. (1907) I. L. R. 34 Cal 922.
4. (1910) 13 C. L. J., page 1.
5. (1875) I. L. R. 1 Cal 144 (P. C.)
6. (1873) 12 B. L. R. 304 at 315=L. R. I. A. Sup. Vol. 212.

Rama Krishna Naidu
v.
Krishna-swami Naidu.

Sadasiva Aiyar, J.

rather to the substance than to the form of action. But even if this interpretation were not correct, their Lordships are of opinion that this clause in the Code of Procedure would by no means prevent the operation of the *general law relating to res judicata*, founded on the principle '*nemo debet bis vexari pro eadem Causa*'. This law has been laid down by a series of cases in this country with which the profession is familiar. It has probably never been better laid down than in a case which was referred to—*Gregory* v. *Molesworth* [1]—in which Lord Hardwicke held that where a question was necessarily decided, in effect though not in express terms, between the parties to the suit, they could not raise the same question as between themselves in any other suit in any other form : and that decision has been followed by a long course of decisions, the greater part of which will be found noticed in the very able notes of Mr. Smith to *the case of the Duchess of Kingston* 2 Smith's L. C. 6th edition 679."

It will be noticed that in the above case, the finding on a question of fact arrived at in a former suit against the defendant was held to be *res judicata*, even though that suit itself had been dismissed on another ground, namely, that the Putni sought to be set aside was binding on the plaintiff.

The next case I shall refer to is the case in *Varathayyangar* v. *Krishnasami* [2] decided by Muthusawmy Aiyar and Parker, JJ. The facts were as follows : V. sought in the first suit to eject K. from a certain land alleging that K was a trespasser. K pleaded that he held as mortgagee under two documents one for Rs. 1,000 and the other for Rs. 50. On second appeal, it was held that K was entitled to defend his possession only by virtue of the mortgage for Rs. 50 and that his other mortgage for Rs. I,000 was invalid for want of registration. The suit was however dismissed as the plaintiff's claim was to eject the defendant as if he was a trespasser which defendant was not. Then V brought the second suit to redeem the mortgage for Rs. 50. The defendant again set up that he had a further mortgage for Rs. 1,000. The District Judge held that notwithstanding the finding in the former suit that the mortgage for Rs. 1,000 was not binding upon the plaintiff, the defendant held a mortgage for a total sum of Rs. 1,050 (Rs. 1,000+Rs. 50). He however dismissed the second suit principally on the ground that it was

1. (1747) 3 Atkyns 626=26 E. R. 1160. 2. (1886) I. L. R 10 Mad. 120.

Rama Krishna Naidu *v.* Krishnaswami Naidu.

Sadasiva Aiyar, J.

barred by Sections 13 and 43 of the old Procedure Code. On second appeal, the learned Judges say : "The decision of the question however, whether respondent could defend his possession under the mortgage for Rs. 1,000 and if not under document 2 (which was for Rs. 50)" was conclusive and binding upon the *parties to that suit* and the respondent" (that is the defendant) "is therefore estopped from now alleging the contrary." Thus, they clearly held that the defendant in that case was bound by the decision against him in the former suit that the bond for Rs. 1,000 was not binding on the plaintiff even though the decree in the former suit was a decree dismissing that suit wholly. My opinion that the observations of their Lordships of the Privy Council in *Run Bahadur Singh* v. *Lucho Koer* [1], should not be extended beyond its legitimate application to the facts of that case, (and its application to the decision of the High Court which gave two contradictory findings and which their Lordships of the Privy Council were criticising) finds strong support from the decision in *Krishna Behari Roy* v. *Bunwari Lall Roy* [2], which their Lordships did not refer to, much less overrule in *Run Bahadur Singh* v. *Lucho Koer* [1]. As I said already, in *Krishna Behari Roy* v. *Bunwari Lall Roy* [2], the first suit was dismissed notwithstanding or in spite of the decision against the defendant K as to the validity of the plaintiff's adoption and yet, the finding against the defendant in the former suit was held to be *res judicata* against that party in the second suit. Here I might be permitted a few general observations. It has been argued that as the doctrine of *res judicata* prevents a Court from going into the merits it should be very strictly and guardedly applied. If this means that where a former decision is relied on as *res judicata*, it and its contents should be strictly proved and mere ambiguous passages in the judgment should not be pressed in favour of the party claiming *res judicata* in his favour, I agree. But if it is intended to be argued that even where the finding is clear and where the intention of the Court to give a definite decision which is not inconsistent with the decree or with any other finding is also patent, still the Court should try its best to evade the very beneficial doctrine that a man should not be twice vexed in respect of the same contest as to his rights and the

1. (1884) I. L. R. 11 Cal. 301. 2. (1875) I. L. R. 1 Cal. 144.

Rama Krishna Naidu *v* Krishnaswami Naidu.

Sadasiva Aiyar, J.

time of the Courts should not be wasted by trying the same matter several times, I entirely dissent. Just as Mr. Justice Mahmood said in a well-known Allahabad case that the doctrine that statutes of limitation as restricting the trial of questions on the merits should be strictly construed is a dangerous doctrine because statutes of limitation are also statutes of repose, based on public policy, so I would hold that the doctrine of *res judicata* should not be unduly conditioned and qualified by all sorts of ingenious attempts at evasion, where there has been in fact a fair contest on a question in dispute between the parties and the Court has intended to give and has given a final decision on that question. Here I might quote certain passages from the decision of their Lordships of the Privy Council in *Sheoparsan Singh* v. *Ramnandanprasad Singh* [1]. There has been much discussion at the bar as to the application of the plea of *res judicata* as a bar to this suit. But in view of the arguments addressed to them, their Lordships desire to emphasize that the rule of *res judicata* while founded on ancient precedent is dictated by a wisdom which is for all time. 'It hath been well said' declared Lord Coke "*interest reipublicae ut sit finis litium* ; otherwise great oppression might be done under colour and pretence of law (6 coke 9 A). Though the rule of the Code may be traced to an English source, it embodies a doctrine in no way opposed to the spirit of the law as expounded by the Hindu commentators. Vijnaneswara and Nilakanta include the plea of a former judgment among those allowed by law, each citing for this purpose the text of Katyayana." "And so the application of the rule" (that is the rule of *res-judicata*) "by the Courts in India *should be influenced by no technical considerations of form but by matter of substance within the limits allowed by law.*"

In this case, to repeat, this Court finally decided as a matter of substance in the former suit that the defendants had no right of ownership to and no right of easement in the vacant site other than an easement of access to the well and its whole circumference. The lower Courts were therefore right in treating the decisions on these two matters as *res-judicata* and I would dismiss the second appeal with costs.

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1. (1916) I. L. R. 43 Cal. 694 at 705 and 706.

Napier J. :—The suit out of which this appeal arises was brought by the plaintiff to enforce his right to build a wall round a well on his land which right he claimed to have been established in an earlier suit against the defendants. The defendants set up in this suit all the defences which they pleaded previously in the former suit and contended that the matter was not *res judicata*. This latter is the sole question before us.

My learned brother has set out the facts at length in his judgment. In the first suit the plaintiff claimed the ownership of the property and that the sole right of the defendants, was access to a part of the well. He had built a wall in such a manner as to give such access and claimed an injunction against the defendants to prevent them from interfering. The defendants claimed ownership of the whole plot of land claimed by the plaintiff and alternatively easement rights across it. When the case came before the High Court in Second Appeal it was remitted for findings to the District Court, and I agree with my learned brother that the result of those findings was the site belonged to the plaintiffs and that the sole right of the defendants was a right of property in the structure of the well and a right of access to the whole of the well. These findings were accepted by the High Court but as the plaintiff had claimed to be entitled to limit the defendants and was building a wall so as to give access to a part only of the well the plaintiff's suit was dismissed. The plaintiff subsequently built a wall giving full effect to the rights found to exist in the defendants by that judgment, and the defendants again interfered with the result that the plaintiff was compelled to file the present suit.

In this suit the defendants have set up exactly the same claims as were negatived in the former suit and contend that the findings in that suit are not *res judicata* because in spite of those findings the suit was dismissed. We have to decide whether this contention is well-founded. The proposition is stated as follows:—that where in spite of the actual findings the suit of the party in whose favour the findings were arrived at is dismissed for any reason those findings are not *res judicata*. The question is to be decided on the language of Section 11 of the Civil Procedure Code and the decisions based on it. The words of Section 11 are "No Court shall try any suit or issue in

Rama Krishna Naidu v. Krisana swami Naidu.

Napier, J.

which the matter directly and substantially in issue in a former suit between the same parties,........................and has been heard and finally decided by such Court."

We have found that the matter directly and substantially in issue in this suit was directly and substantially in issue in the former suit and has been heard in that suit. It is contended however, that it has not been finally decided and even if finally decided there has been engrafted on this section by decisions of the Privy Council the limitation above referred to. As there is authority for this contention in decisions of other Courts I think it necessary to examine the question somewhat at length.

The first thing to be noted is that the section does not say that the decision must be engrafted in a decree. That this is unnecessary will of course be apparent from the fact that it would depend entirely on who was the plaintiff and who was the defendant in any suit, whether the rights were so incorporated. If the person in whose favour the right was established was the plaintiff those rights would appear in the decree. If on the form of the litigation he was the defendant the suit against him would simply be dismissed and the decree would be silent on the subject. We have here a case, however, where the rights have been found in favour of the plaintiff but the suit has been dismissed because he put his claim too high.

The basis of the law of *res judicata* is stated by their Lordships of the Privy Council in *Sheoparsan Singh* v. *Ram Nandan Prasad Singh* [1]. In England the proposition is that it is for the well-being of the state that there should be an end of the litigation. That is the doctrine declared by Lord Coke. In ancient India it is founded on the text of Katyayana that if a person defeated at law sues again he should be answered "you were defeated formerly." These are the foundations of the doctrine as stated by their Lordships in page 706 of that case. Their Lordships further point out what is most important that the application of the rule by the Court should be influenced by no technical considerations of form but by matter of substance. Applying this doctrine to the language of S. 11 it seems difficult to argue that where the matter has been directly and substantially decided it is not finally decided because the form of the

1 (1916) I. L. R 43 Cal. 694.

litigation or the extent of the plaintiff's claim prevented a decree in accordance with the decision.

Rama Krishna Naidu v. Krishnaswami Naidu.

Napier, J.

The law of *res judicata* as applicable to India was considered by their Lordships of the Privy Council on the construction of the first Civil Procedure Code, Act VIII of 1859. S. 2 of that Code provided that "Civil Courts shall not take cognizance of any suit brought on any cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit". This language was considered by their Lordships in *Soorjomonee Dayee* v. *Suddanund Mohapatter* [1]. At page 315 the report states that if the term 'cause of action' will not directly cover the matter which is claimed to be *res judicata* they are of opinion that this clause "would by no means prevent the operation of the general law relating to *res judicata* founded on the principle '*nemo debet bis vexari pro eadem causa*'; and their Lordships adopt the language of Lord Hardwicke in *Gregory* v *Molesworth* [2], that "where a question was necessarily decided in effect, though not in express terms, between parties to the suit, they could not raise the same question as between themselves in any other suit in any other form." These propositions were reiterated by the Board in a case on the same Code 3 years later, *Krishna Behari Roy* v. *Bunwari Lall Roy* [3]. That case is of importance because, as pointed out by my learned brother, the position was very like the position in this case. In the former suit in that case A claiming to be the adopted son and heir of B instituted a suit to set aside certain Putni leases. One of the defences was that A was not the adopted son of B, and a certain person C who claimed to be the reversionary heir of B was made a co-defendant. This issue was tried and decided in favour of A but the suit was dismissed as it was found in favour of Patnidar that the Putni could not be set aside. This judgment was upheld by the High Court. Subsequently C brought a suit against A to set aside the adoption alleged by him. The High Court held that the matter was *res judicata* and this view was upheld by the Privy Council on the authority of their previous decision in *Soorjomonee Dayee* v. *Suddanund Mahapatter* [1]. I agree with my learned brother that this authority covers the present case;

1. (1873) 12 Beng. L. R. 304. 2. (1747) 3 Atkyns. 626.
3. (1875) I. L. R. 1 Cal. 144.

Rama Krishna Naidu v. Krishnaswami Naidu.

Napier, J.

and it is not argued before us, and could not be successfully argued, that the more definite language of the present Code has in any way limited the scope of the doctrine.............. *Vide Run Bahadur Singh* v. *Lucho Koer* [1]. This principle was applied by this Court in a case in *Varathayyangar* v. *Krishnasami* [2]. The question was also considered by a Full Bench of five Judges of the Calcutta High Court in *Niamut Khan* v. *Phadu Buldia* [3], where their Lordships stated that they are bound to follow in its integrity the rule laid down by the Privy Council in the above cases. In that case A brought a suit against B for enhancement of rent. B's defence was first, no notice, secondly that the rent was not enhanceable. The Munsif found that the rent was enhanceable but dismissed the suit for want of notice. The decision of the Full Bench was that as the opinion of the Court has been given on a question which had been raised by the pleadings and argued that opinion must be considered as *res judicata* even though it may not have been embodied in the decree. In a subsequent case in the same Court, *Thakur Magundeo* v. *Thakur Mahadeo Singh* [4], ... a Bench of that Court declined to follow the judgment of the Full Bench on two grounds, (1) that the decision had not been followed in that Court and (2) that the Privy Council in a more recent case had expressed an opinion which was in opposition to the judgment of the Full Bench. It is to be noted that the Bench did not consider the judgment of the Privy Council on which the decision of the Full Bench was founded, nor did they note that the subsequent decision of the Privy Council, namely, *Run Bahadur Singh* v. *Lucho Koer* [1], did not purport in any way to overrule the previous decision quoted at length by their Lordships. In my opinion the learned Judges entirely misunderstood the decision in *Run Bahadur Singh* v. *Lucho Koer* [1]. The facts of this case were as follows:— One Run Bahadur Singh sued the widow of his deceased brother, Murlidhar Singh, to recover possession of Murlidhar's property on the ground that he and his brother were joint in estate. The widow maintained that the brothers were separate and claimed a widow's estate. She further maintained that the question had been conclusively determined in her favour in a

1. (1884) I L. R. 11 Cal. 301.
2. (1886) I. L. R. 10 Mad. 102.
3. (1880) I. L. R. 6 Cal. 319.
4. (1891) I. L R. 18 Cal. 647.

Rama Krishna Naidu v. Krishnaswami Naidu.

Napier, J.

former suit. The High Court determined the plea of *res judicata* in her favour. At the same time the High Court considered the evidence adduced in the trial on the point and found that the brothers had been joint. But having decided that the matter was *res judicata* in her favour they dismissed the suit. The widow appealed against the finding of facts on the evidence and with regard to that their Lordships of the Privy Council say 'it may be supposed that her advisers were apprehensive lest that finding should be hereafter held conclusive against her but this could not be so inasmuch as the decree was not based upon it but was made in spite of it." It is this language which has given rise to what I conceive to be the misapprehension in the subsequent cases. For it has been treated as a dictum that wherever there is a finding which is not given effect to by a decree that finding is not *res judicata*. I am clear that their Lordships of the Privy Council never intended to lay down any such proposition. They simply said that where a Court gives a finding because it is bound to do so by reason of the application of the doctrine of *res judicata* and embodies that finding in a decree any other finding on the evidence which negatives the finding that is the basis of the decree cannot be *res judicata*. This proposition seems to me to be obvious, for the finding based on the finding of *res judicata* must continue to be *res judicata* for all time and necessarily a finding of fact on the evidence cannot have the slightest effect. It is certainly unusual for the High Court to give findings on the evidence where they have found the opposite on a plea of *res judicata*, but it is done every day in the original Courts of this country. Munsifs return findings on all issues and it would be an extraordinary contention that a finding of fact on one issue by a Munsif on the evidence should have any validity as against his own finding based on *res judicata* which has been upheld in the Appellate Court. The learned Vakil for the appellant has pointed out that this decision in *Thakur Magundeo* v. *Thakur Mahadeo Singh* [1] has been followed in subsequent cases. I do not think it necessary to examine them because I am satisfied that this decision is based on a complete misunderstanding of the decision in *Run Bahadur Singh* v. *Lucho Koer* [2] and that

1. (1891) I. L. R. 18 Cal. 647.

2. (1884) I. L. R. 11 Cal. 301.

Rama Krishna Naidu v. Krishnaswami Naidu.

Napier, J.

the true principles were stated in the decision of the Full Bench of that Court in *Niamut Khan* v. *Phadu Buldia* [1].

My learned brother has dealt with some cases of this Court which seem to adopt the view laid in *Thakur Magundeo* v. *Thakur Mahadeo Singh* [2] as good law. If those decisions do go to the length of the propositions stated in *Thakur Magundeo* v. *Thakur Mahadeo Singh* [2] I must respectfully dissent from them. This case is in my opinion clearly covered by the decision of the Privy Council in *Krishna Behari Roy* v. *Bunwari Lall Roy* [3] and I am bound to follow it.

I agree with my learned brother that the appeal must be dismissed with costs.

A. V. V.

PRIVY COUNCIL.

PRESENT :—VISCOUNT HALDANE, VISCOUNT CAVE, LORD PHILLIMORE, SIR JOHN EDGE, AND MR. AMEER ALI.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Raghunath Roy Marwari and others ... *Plaintiffs* Appellants.*

v.

Raja of Jheria and others ... *Defendants-Respondents.*

P. C.

Raghunath Roy Marwari v. Raja of Jheria.

Land Law of India—Permanent settlement—Right to minerals—Grant by zemindar of tenure in lands within Zemindari—Does not pass right to minerals by implication—Express words necessary—Same principle applicable to rent-free tenures

Where a Zemindar grants a tenure in lands within his Zemindari, and it does not clearly appear by the terms of the grant that a right to the minerals is included, the minerals do not pass to the grantee.

Sashi Bhushan Misra v. *Jyoti Prashad Singh Deo* [4] followed.

It is immaterial that the tenure granted by the Zemindar is a rent free tenure: the same rule applies.

Appeal from a decree of the Calcutta High Court reversing a decree of the Additional Subordinate Judge of Purulia.

The plaintiffs-appellants sued for a declaration that under a potta of May 15. 1908, they were entitled to work and get coal underlying certain land in Mouzah Chandkuia, and to use certain waste lands of the Mouzah for the purpose. They alleged dispossession by the Raja of Jheria (defendant respondent No 1), from whom they claimed possession and mesne profits. The plaintiffs further impleaded certain

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* 27, 28, 30 and 31st January, 1919.

1. (1880) I. L. R. 6 Cal. 309.
2. (1891) I L. R. 18 Cal. 647.
3. (1875) I L. R. 1 Cal. 144.
4. (1916) L. R. 44 I. A. 46=32 M. L. J. 245.

P. C.
Raghunath Roy Marwari
v.
Raja of Jheria.

persons known as the Bhuttacharjis-defendants who had granted plaintiffs the potta relied on : against these they claimed an order for demarcation of the coal bearing land, and if it be found by the Court that they had no right to that land, cancellation of the potta of May 15, 1908 and of plaintiffs' liability to pay rent and royalty thereunder. There were also impleaded as defendants certain other persons known as the Chakravartis; the Bhuttacharji's defendants derived their rights from an earlier potta granted to them on April 21, 1908 by these latter, and the Chakravartis in turn claimed under a still earlier grant of 1791 of "rent-free Brahmottar" land in Mouza Chandkuia by the ancestor of defendant No. 1. The substantial issue in the suit was whether this grant of 1791 passed the minerals. Further facts are stated in their Lordships' judgment, where the material parts of the potta of 1791 are set out.

Before the present suit was instituted, the Bhuttacharjis had filed suits against the plaintiffs to recover the amount of two promissory notes given in part payment of premium for the potta and for royalties payable thereunder, and had obtained decrees which were confirmed on appeal. A second appeal to the High Court was pending when the present suit was filed.

All the defendants denied the ouster alleged by the plaintiffs. The Raja claimed that the mineral rights were vested in him. The remaining defendants alleged that they passed under the various pottas with which they were respectively concerned. The Bhuttacharjis pleaded in addition that as regards any relief claimed against them the suit was barred by *res judicata* by the decision in their own suits against the plaintiffs.

The following (among other) issues were fixed (1) whether the Rajah has interfered with the possession of the plaintiffs; (2) to what damages or mesne profits are plaintiffs entitled: (3) if there was any interference by the Rajah, whether it was lawful and under any title : (4) whether the previous decisions will operate as *res judicata* between the plaintiffs and the Bhuttacharji defendants.

The Subordinate Judge found on all issues for the plaintiffs as againt the Raja. As between plaintiffs and the Bhuttacharjis however he held that *res judicata* applied. He declared plaintiffs' title and gave them a decree for possession and mesne profits: he refused their prayer for demarcation of the 450 bighas on the ground that another person entitled to a remaining 100 bighas had not been impleaded.

The Rajah appealed to the High Court, which heard the appeal along with the second appeals filed by plaintiffs in the earlier suits brought by the Bhuttacharjis. The learned Judges (Fletcher and

P. C.

Raghunath Roy Marwari v. Raja of Jheria.

Richardson) dismissed the second appeals. In the Rajah's appeal they did not go into the question of title, but found no ouster had been proved. On this finding they allowed the appeal and dismissed plaintiffs' suit.

Hence this appeal.

De Gruyther, K. C. and *Kenworthy Brown* for appellants.

Upjohn, K. C., Dunne K. C. and *Sir W. Garth* for the 1st Respondent (the Raja).

Dube for the Bhuttacharji respondents.

De Gruyther K. C. for appellants submitted that the Subordinate Judge had rightly found on the evidence that the Rajah had interfered with plaintiff's possession and forcibly prevented them from working the mine. The plaintiffs were entitled to recover damages from the Rajah. (As to the measure of damages reference was made to Mayne on Damages, 8th edn. p. 524 and to O. 20, R. 12, Civil Procedure Code of 1908). Even assuming the High Court was right in finding there was no ouster, the plaintiffs were anyhow entitled to a declaration of their title. The High Court had not decided that the title was in plaintiffs and their lessors, but had assumed such was the case; the Subordinate Judge's findings stand. The recent decisions of the Board on the question whether or not minerals pass under grants do not apply. The appeal against the Bhuttacharjis only arises if that against the Rajah fails.

Upjohn, K. C. for the Rajah: It has been established by four decisions of this Board that when land within a Zemindari the jama of which has been settled, is granted whether the tenure is in perpetuity or not, the presumption is that the minerals do not pass. *Kumar Hari Narayan* v. *Sri Ram* [1], *Rajah Durga Prasad* v. *Braja Nath* [2], *Sashi Bhusan Misra* v. *Jyoti Prasad* [3], *Girdhari Singh* v. *Megh Lal* [4],

(*De Gruyther*: I deny that the Zemindar pays any revenue in respect of this village)

The grant is rent free, but the village is included in the Zemindari and in the area on which the jama is assessed. In this case it is not really necessary to rely on the decisions as to presumption, for the grant itself sets out that it was for cultivation and rent free: in 1791 the existence of coal was unknown.

The grant in *Kumar Hari Narayan* v. *Sri Ram* [1] was after the permanent settlement; so the grantor in that case undoubtedly had the minerals to grant, yet it was held they did not pass under it.

(*Viscount Haldane* referred to pp. 144, 145 of the report. It was

1. (1910) L. R. 37 I. A. 136=20 M. L. J. 569.
2. (1911) L. R. 39 I. A. 133=23 M. L. J. 26
3. (1916) L. R. 44 I. A. 46=32 M. L. J. 245=44 Cal. 585.
4. (1917) L. R. 44 I. A. 246=33 M. L. J. 687.

P. C.
Raghunath Roy Marwari v. Raja of Jheria.

found in that case there was a tenure. The grantee was a cultivator or "britti-holder" and had a lien for religious purposes like debottar. The smallness of the jama was an element).

Kumar Hari Narayan v. *Sri Ram* [1], was explained in the next case, *Rajah Durga Prasad* v. *Braja Nath* [2]. That was a grant to a digwar.

(*Viscount Cave* : A grantee liable to dismissal).

Only by Government : the tenure was permanent for the support of the office. The only distinction between *Sashi Bhushan Misra* v *Jyoti Pershad* [3], and the present case is that in the former Lord Buckmaster pointed out that " at a fixed rent " was not given in the earlier cases : if anything the distinction is in our favour.

There is no question of a separate tenure here ; para. 1 of the plaint sets out that the entire mouzah " is included in the ancestral Zemindary of the defendant No. 1".

De Gruyther, K. C. in reply : The four cases cited deal only with grants in the nature of leases : this is not such a grant.

The Regulation excludes lakhiraj grants from the permanent settlement. The onus is on respondents to show that the lands are included in their sanad.

(*Sir John Edge* : But you say in your plaint the land was included in the Zemindari)

So it was : but in 1791 it was granted as lakhiraj *i.e.*, revenue free. The question is what had the Zemindar in 1791 ? Two years later he was recognized as absolute proprietor, but he did not become proprietor of this land then, because it was already lakhiraj. What he claimed before the permanent settlement was revenue, not rent : it was the revenue which he gave up in 1791. This land is not mal or revenue paying land : the Zemindar has no rights in it at all : all the rights he ever had he gave away in 1791. (Reference was made to Bengal Regulation VIII. of 1793, S. 36, and to Bengal Regulation XVII of 1793.

(*Upjohn* referred to Bengal Regulation XIX of 1793, S. 10.)

[Their Lordships intimated they did not desire to hear counsel foı the Rajah further.]

De Gruyther then submitted that plaintiffs had claimed an alternative relief against the Buttacharji defendants, and were entitled to that relief if their appeal against the Rajah failed.

Dube: for the Bhuttacharji respondent submitted that the plaintiffs had pleaded ouster in the former suits brought against them by the Bhuttacharjis : an issue had been raised and decided against them.

1. (1910) L. R. 37 I. A. 136. 2. (1911) L. R. 39 I. A. 133.
3 (1916) L. R. 44 I. A 46.

P. C.
Raghunath Roy Marwari v. Raja of Jheria.

That judgment stood. The principle of *res judicata* precluded the plaintiffs from now alleging ouster; as against the Bhuttacharjis they must be taken to be in possession of the mine.

(*Viscount Haldane.*—The Courts below have not dealt with this alternative claim. The Board will express no opinion on it.)

Their Lordships' judgment was delivered (February 20, 1919) by

Sir John Edge.—This an appeal by the plaintiffs from a decree, dated the 26th March, 1914, of the High Court at Calcutta, which set aside a decree, dated the 24th June, 1912, of the Additional Subordinate Judge of Purulia, and dismissed the suit.

The suit in which this appeal has arisen was brought on the 25th April, 1911, by the plaintiffs for a declaration that they were, under a *pottah* of the 15th May, 1908, entitled to work and get the coal underlying 450 *bighas* of land in Mouzah Chandkuia, and to use and occupy certain waste *danga* lands of the Mouzah as they might require them for the purposes of the colliery. They alleged that they had been dispossessed by the Rajah of Jheria, the defendant No. 1, and as against him they further claimed a decree for mesne profits. The defendants Nos. 2 and 3 had granted the *pottah* under which the plaintiffs claimed title, and as against them the plaintiffs sought certain other reliefs to which they alleged that they were entitled. One of these other reliefs which the plaintiffs claimed as against the defendants Nos. 2 and 3 was an order that the defendants Nos. 2 and 3 should demarcate the 450 *bighas* of land, the coal underlying which had been leased to the plaintiffs by the *pottah*. The Subordinate Judge who tried the suit refused to make an order for demarcation on the ground that other persons interested had not been made parties to the suit. The other reliefs claimed by the plaintiffs were not investigated by either of the Courts below. The Raja of Jheria's answer to the suit, so far as he was concerned, was a denial of the title of the plaintiffs to the coal, an assertion of title in himself to all the coal in Mouzah Chandkuia, and a denial that he had dispossessed the plaintiffs and of their right to a decree for mesne profits.

The Subordinate Judge found the issue as to title in favour of the plaintiffs, declared their title, and gave them a decree for

Rs. 11,334-8-0 as mesne profits as against the Raja of Jheria. From that decree the Raja of Jheria appealed to the High Court at Calcutta. One of his grounds in his memorandum of appeal to the High Court distinctly alleged that the minerals were vested in him alone. The learned Judges who heard the appeal in the High Court did not express any opinion on the question of the title to the coal, but having come to the conclusion that the plaintiffs had failed to prove a dispossession by the Raja of Jheria or his servants, set aside the decree of the Subordinate Judge, and by their decree dismissed the suit. What these learned Judges apparently considered was that the plaintiffs had failed to prove any facts which would make the Raja of Jheria liable to have a decree for mesne profits made against him as he expression "mesne profits" is defined in S. 2 (12) of the Code of Civil Procedure, 1908 (Act V of 1908). As the claim for mesne profits was not dismissed on the ground that the plaintiffs had failed to prove that the title to the coal was vested in them, the claim of the plaintiffs for a declaration of title should have been considered and disposed of by the High Court. From that decree dismissing the suit this appeal to His Majesty in Council has been brought.

It is alleged in the plaint that this Mouzah Chandkuia is included in the ancestral zamindary of the Raja of Jheria, and there is nothing on the record to suggest that that statement is not correct. In 1791 the Rajah of Jheria's ancestor, Sri Sri Mohan Lal, who was then the Zemindar of Mouzah Chandkuia, granted to Sri Lakshan Chakravarti "rent-free Brahmottar land" in Mouzah Chandkuia by a *pottah* which, so far as is material, is as translated in the following terms :—

"The 8th January"—

"Pottah of agreement granted by the High in dignity, Maharaja Sri Sri Mohan Singh."

"Respects to Sri Lakshan Chakravarti."

"I hereby grant you rent-free Brahmottar land, in Mouzah Chandkuia in pergunnah Jheria. You should enjoy it comfortably by cultivating and getting the same cultivated by others and should bless me. Hence, this pottah is granted to you"

"Dated at Garh Cutchery."

"The 29th Chait Akhiri of the year 1197."

Their Lordships will presently consider the effect of that *pottah*, as upon the construction of it the question of the title to the coal underlying Mouzah Chandkuia at the time when the

P. C.

Raghunath Roy Marwari v. Raja of Jheria.

acts complained of by the Raja and his servants are alleged to have occurred depends. On the 21st April, 1903, the successors-in-title of the grantee of the *pottah* of 1791, who may be for brevity described as the Chakravarti defendants, granted to persons, who may for brevity be described as the Bhuttacharji defendants, a coal-mining *pottah* of the coal underlying Mouzah Chandkuia, with liberty to use such *danga* lands and tanks then in the grantors' *khas* possession as would be required for working the colliery. On the 18th May, 1908, the Bhuttacharji defendants granted to the plaintiffs a coal-mining *pottah* of the coal underlying 450 *bighas* of the said Mouzah, with certain surface rights necessary for working the colliery. After the plaintiffs had obtained their *pottah* of the 18th May, 1908, they commenced to open up the colliery. The Raja of Jheria thereupon, through his servants, gave to the plaintiffs notice that the coal underlying Mouzah Chandkuia was vested in him, and insisted that the plaintiffs should not proceed with their workings. Ultimately the plaintiffs ceased to work, and brought this suit to have their rights declared and to obtain such relief as they might be entitled to as against the Raja of Jheria and their lessors respectively. Their Loadships will confine their advice to His Majesty to the question of the title to the coal underlying Mouzah Chandkuia, as that title was when the acts complained of by the Raja of Jheria and his servants are alleged to have occurred, and as it was when this suit was instituted, and will not express any opinion as to the rights, if any, which the plaintiffs may have against the defendants other than the Raja of Jheria.

The question of the title to the coal in question here must, as their Lordships have said, depend upon the construction of the *pottah* of 1791. On behalf of the plaintiffs, the appellants here, it has been contended that the *pottah* of 1791 was an absolute grant by the then Raja of all his rights and interest in Mouzah Chandkuia, including the minerals, to Sri Lakshan Chakravarti. On behalf of the Raja of Jheria, a respondent to this appeal, it has been contended that the minerals did not pass under that *pottah*, and remained vested in the grantor, of whom the present Raja of Jheria is the representative in title. The construction of the *pottah* of 1791 contended for on behalf of the plaintiffs would doubtless be the construction to be

P. C.

Raghunath Roy Marwari v. Raja of Jheria.

Sir John Edge.

placed upon it if the *pottah* had been a grant of freehold lands in England by an owner in fee, but the *pottah* in question here was a grant by a Zamindar in India of a holding creating a tenure within his Zamindari, and must be construed as such grants by Zamindars have been construed by the Board.

In *Kumar Hari Narayan Singh Rao Bahadur and another* v. *Sriram Chakravarti and others*, [1] in which the Mouzah there in question was held of the Zamindar by Goshains on a permanent debottar tenure, subject to a rent of about Rs. 25 paid to the Zamindar, Lord Collins, in delivering the judgment of the Board, said :—

"On the whole it seems to their Lordships that the title of the Zamindar Rajah to the village Patma as part of his Zamindari before the arrival of the Goshains on the scene being established as it has been, he must be presumed to be the owner of the underground rights thereto appertaining in the absence of evidence that he ever parted with them, and no such evidence has been produced."

In that judgment the view was referred to with approval that was expressed by Mr. Field in his Introduction to the "Bengal Regulations," that :—

"The Zamindar can grant leases either for a term or in perpetuity. He is entitled to rent for all land lying within the limits of his Zamindari, and the rights of mining, fishing, and other incorporeal rights are included in his proprietorship."

An explanation as to leases in perpetuity in India, given by Jenkins, J. in *Kally Dass Ahiri* v. *Monmohini Dassee*, [2] is instructive. It was that :—

"Because at the present day a conveyance in fee simple leaves nothing to the grantor, it does not follow that a lease in perpetuity here has any such result. . . The law of this country does undoubtedly allow of a lease in perpetuity. . . A man who, being owner of land, grants a lease in perpetuity carves a subordinate interest out of his own and does not annihilate his own interest. This result is to be inferred by the use of the word 'lease,' which implies an interest still remaining in the grantor.

That statement was quoted with approval by the Board in *Abhiram Goswami and another* v. *Shyam Charan Nandi and others*, [3].

In *Raja Sri Sri Durga Prasad Singh* v. *Braja Nath Bose and others*, [4] the present defendant-respondent in this appeal, as the Zamindar of Pergunnah Jheria, sued the defendants in that suit for a declaration of his rights to the minerals lying under two Mouzahs situate within his Zamindari, and for a permanent injunction restraining the defendants from working for coal. The

1. (1910) L. R. 37 I. A. 136. 2. (1897) I. L. R. 24 Cal., at p. 447.
3. (1909) L. R. 36 I. A. at p. 167. 4. (1911) L. R. 39 I. A. 133.

P. C.

Raghunath Roy Marwari v. Raja of Jheria.

Sir John Edge.

first defendant in that suit was the *Digwar* of Tasra, and he had worked the coal in the Mouzahs, and had paid cesses in respect thereof to the Government under the Cess Act. The second defendant in that suit was the assignee of a lease granted by the Digwar of Tasra, which included a right to mine for coal in the Mouzahs. In the judgment of the Board it was stated that the two Mouzahs were held by the Digwar of Tasra on Digwari tenure at a fixed rent of Rs. 64 per annum, payable to the Zamindar, and that the tenure was hereditary. The Board held that the two Mouzahs there in question were within the plaintiffs' Zamindari, and that :—

> "No attempt was made to prove that the mineral rights now in question were vested in the Digwar before or at the time of the permanent settlement if the lands were then held on Digwari tenure. Nor is there the slightest evidence tending to show or to suggest that the Zamindar ever parted with his mineral rights to the Digwar."

And the Board advised His Majesty that the decree of the Subordinate Judge which had decreed the plaintiffs' claim should be restored. That decree of the Subordinate Judge had been set aside by the High Court at Calcutta on appeal. In that suit it was either admitted or proved that the permanent settlement was made with the Zamindar of Jheria, and that no separate settlement was made with the Digwar of Tasra. In the present suit no evidence was produced as to what was done at the permanent-settlement in respect of Mouzah Chandkuia, but the absence of such evidence does not lead to a presumption that the Zamindar had not then vested in him the mineral rights in Mouzah Chandkuia.

In *Sashi Bhushan Misra and others* v. *Jyoti Prashad Singh Deo and others*, 1 the Raja of Pachete, who was the plaintiff, claimed a declaration that he was entitled to the mineral rights in the village in that suit. The defendants alleged in their written statement that the Mouzah was held by them and their predecessors under Talabi Brahmottar rights from a date before the permanent settlement, and they claimed that their rights were those of proprietors, subject to the payment of a fixed rent, and that they had full rights in the subsoil. The grant relied upon by the defendants was not produced, nor was any evidence as to its terms given at the trial, but there was evidence that in 1790 the predecessor of the plaintiff had referred to the Mouzah as Talabi

1. (1916) L. R. 44 I. A. 46.

P. C.

Raghunath Roy Marwari v Raja of Jheria.

Sir John Edge.

Brahmottar with a jamma of sicca Rs. 25. In the judgment in that appeal, which was delivered by Lord Buckmaster, L. C., the decisions of the Board in *Kumar Hari Narayan Singh Deo* v. *Sriram Chakravarti*[1] and *Raja SriSri Durga Prasad Singh* v. *Braja Nath Bose*, [2] were considered, and their Lordships said :—

"These decisions, therefore, have laid down a principle which applies to and concludes the present dispute They established that when a grant is made by a Zamindar of a tenure at a fixed rent, although the tenure may be permanent, heritable, and transferable, minerals will not be held to have formed part of the grant in the absence of express evidence to that effect."

It has been contended on behalf of the appellants in the present appeal that in the judgment which Lord Buckmaster delivered the Board intended to limit the principle to be derived from the decisions which had been referred to, to grants made by a Zemindar of tenures at fixed rents, and that the principle did not apply here, where the tenure was granted rent free. It so happened that in that particular case the tenure was at a fixed rent, but it appears clear to their Lordships that the principle must equally apply when the tenure granted by the Zemindar is a rent-free tenure. Their Lordships do not know what was the vernacular term in the *pottah* of 1791 which has been translated as "rent free" but in the plaint it is alleged that the right granted was a "rent-free Brahmottar right," and the trial judge, who was a native and presumably understood the vernacular, states in his judgment that :—

"The plaintiffs' case is that the whole Mouzah Chandkuia described in Schedule I of the plaint belongs to the defendants Nos. 8 to 25 as their rent-free Brahmottar property, under a sănad dated 29th Chaitra 1197, from Raja Mohan Singh, the ancestor of the defendant No 1, granted to Lakshan Chakravarti."

If the holding had been described, as on behalf of the plaintiffs it has been contended it was described in the vernacular *pottah* of 1791 as "revenue-free Brahmottar," it could make no difference, as the holding was one created or ratified by the Zamindar of land within his Zamindari, and no mineral rights were mentioned in the *pottah*.

In *Girdhari Singh* v. *Megh Lal Panday*, [3] in which a Mokarari lease of lands by a Zamindar contained the words *mai-hak hakuk* (with all rights), the Board applied the principles which had been stated in Lord Buckmaster's judgment in *Sashi*

1. (1910) L. R. 37 I. A. 136=20 M. L. J. 519 2. (1911) L. R. 39 I A. 133.
3. (1917) L. R 44 I. A. 246.

P. C.

Raghunath Roy Marwari v. Rajah of Jheria.

Sir John Edge

Bhushan Misra and others v. *Jyoti Prashad Singh Deo and others.* 1.

The result at which their Lordships have arrived after a consideration of the decisions of the Board is that where a Zamindar grants a tenure in lands within his Zamindari, and it does not clearly appear by the terms of the grant that a right to the minerals is included, the minerals do not pass to the grantee and their Lordships hold that the coal underlying Mouzah Chandkuia when the interferences complained of occurred, and on the 25th April, 1911, when this suit was instituted, was vested in the Raja of Jheria alone, and on that ground the suit against him should have been dismissed with costs in the Courts below, and that this appeal as against the Raja should be dismissed, and they will so humbly advise His Majesty. The appellants must pay the costs of the Raja of Jheria in this appeal.

Their Lordships will also humbly advice His Majesty that the suit as against the defendants other than the Raja of Jheria should be remanded to the Court of the Subordinate Judge to be disposed of according to law. There will be no order as to the costs of this appeal as between the appellants and the defendants other than the Raja of Jheria.

Solicitors for the Appellants :—*T. L. Wilson & Co.*

Solicitors for the Respondents :—*Rajah* : *E. Pugh. & Co.*

Solicitors for the Respondents :—*Bhuttacharjis* : *W. W. Box. & Co.*

A. P. P,

[*End of Volume XXXVI Reports.*]

General Index

TO

Vol. XXXVI.

PAGE

Administrator de son tort.

Administrator de son tort—*Liability to account—Limitation—Claim by Muhammadan heirs whether a joint cause of action.*

An administrator de son tort of properties is not responsible as an agent to render an account of the properties. He is only responsible to refund the moneys which he has received on behalf of the estate.

In a Muhammadan family, the heirs are entitled to definite shares as tenants-in-common; and the cause of action of such heirs cannot be said to be a joint one for the purpose of limitation.

Ahinsa Bibi v. *Abdul Kadir Saheb*, (1901) I. L. R. 25 Mad. 26. considered.

Alla Pichai Rowthan v. *Pappathiammal.* (*Ayling and Seshagiri Aiyar, JJ.*) 184

Admissibility—Promissory Note executed outside British India—No proper stamp 188

Appeal—Order as to costs.—Order passed on review of taxation by taxing officer under rules 37 and 38 of O. S. Fees rules-appeal from, if lies. 351

———Order under S. 95 C. P. C., by Small Cause Court—Appeal from does not lie 435

Appropriation.—Payments by debtor without specific directions—Creditor entitled to credit to interest up-to-date and balance for portion of the principal 295

Arbitration—Reference to arbitrators including presiding Judge—C. P. C. Sch. II does not apply—Validity—Award by majority and decree thereon 291

———Reference to-validity—*Ex parte* defendant interested in reference not being a party to same 538

Award—Reference to arbitrators including presiding Judge—Award by majority and decree thereon—Binding nature of 291

Benamidar, position of—*Benamidar can maintain an action without joining real owner—Person beneficially entitled, whether bound by suits by or against benamidar—Transactions with Hindu females—Duty of purchasers from them to ascertain the extent of their powers—Contingent reversioner cannot bind his expectancy by joining in deed of sale—Doctrine of feeding the estoppel inapplicable.*

A benamidar represents the real owner, and so far as their relative legal position is concerned is a mere trustee for him. An action can be maintained in the name of the benamidar in respect of the property that stands in his name although the beneficial owner is no party to it. It is open to the latter to apply to be joined in the action: but whether he is made a party or not, a proceeding by or against his representative in its ultimate result is fully binding on him.

PAGE

Benamidar, position of—*Contd.*

It is the duty of a person dealing with a Hindu female to acquaint himself with the extent of her powers.

In a sale by a Hindu female, her grandson, who was a contingent reversioner, joined, and purported to dispose of his future interest.

Held, that his association in the deed of sale was wholly futile and had no legal effect in validating the transaction if otherwise invalid.

Choudhri Gur Narayan v. *Sheo Lal Singh.* (*Mr. Ameer Ali*) ... 68

———Assignee—Right to sue on mortgage 289

Bengal Patni Taluqs Regulation (Reg. VIII of 1819), Ss. 14, 15—Sale of patni for arrears of rent—Reversal of sale—No indemnity provided for purchaser—Remedies of purchaser whose sale is set aside—Remedy in S. 14, if exclusive 557

Bombay Civil Courts Act, 1869 (Act XIV of 1869), Ss. 24, 27—Respective jurisdictions of First and Second class Subordinate Judges ... 437

Burden of Proof—Debt contracted by manager of a Hindu joint trading family—Binding nature of—Presumption—Failure to produce account books and explain for non-production—Shifting of burden ... 568

———Money borrowed by manager of Hindu joint family at high rate of interest—Legal Necessity—Necessity for exceptional terms ... 521

———Ownership of the soil—Right of pattadar—Claim of occupancy right by cultivating tenant 463

Cause of Action—Hindu joint family—Sale by manager of family property—Subsequent sale by junior member of his share therein—Obstruction by prior purchaser to the taking of possession by the subsequent purchaser—Litigation by latter to recover ending unfavourably—Suit to recover sale price and expenses of litigation—Date of cause of action 157

———Payment by judgment-debtor of decree amount outside Court—Omission to certify payment—Decree-holder assigns decree to person having knowledge of satisfaction—Execution of decree by assignee—Suit by judgment-debtor against decree-holder and assignee for damages 376

———Satisfaction of decree out of Court—Omission to certify payment under O. 21, R. 2 C.P.C—Filing of execution application—No amount realised—Breach of implied contract to certify—Successive execution applications—Successive breaches 175

Civil Procedure, S. 2 (2) and O. 1, R. 10—*Order striking out the name of a defendant and dismissing suit as against him—Decree—Appealability—Specific Relief Act, S. 42—Declaratory relief—Discretion of Court—Suit for bare declaration that plaintiff is the next reversioner and not the defendant, if maintainable.*

Where in a pending suit the Court makes an order striking out the name of one of the defendants and dismissing the suit as against him on the ground that the plaint disclosed no cause of action, the order though purporting to be made under O. 1, R. 10 of the C. P. Code is a decree and is appealable as such.

The grant of declaratory relief under S. 42 of the Specific Relief Act is discretionary with the Court and there is a settled rule of practice against the grant of such relief when the only question for decision is which of two persons is entitled to the character of next reversioner at the date of the institution of the suit—a decision which may serve no useful purpose as both the claimants may be dead and a different person entitled

C. P. Code—*Contd.* PAGE

to succeed when the succession actually opens. Where the plaintiffs sued for a bare declaration that they were the next reversioners of a deceased Hindu and that the defendant was not entitled to usurp the character of next reversioner. *Held*, that the suit was not maintainable. *Saudagar Singh* v. *Pardip Narayan Singh*, (1917) I. L. R. 45 C. 510 P. C. Referred to.

Sri Rajah Rao Venkata Mahipati Gangadhara Ramarao Bahadur Garu v. *Sri Rajah Rao Venkata Kumara Mahipati Surya Rao Bahadur Garu.* (*Wallis, C. J. and Seshagiri Aiyar, J.*) 169

——**S. 11**—Res Judicata—*Heard and finally decided—Findings in a suit not necessary for the final decision—Decree in spite of the findings—Findings if and when operate as* res judicata

The application of the rule of *res judicata* by the Courts should be influenced by no technical consideration of form but by matter of substance.

Sheoparsan Singh v. *Ramnandan Prasad*, (1916) I. L. R. 43 Cal. 694 P. C. *Relied on.*

S. 11 of the Code of Civil Procedure requires, among other things, that an issue should have been heard and finally decided in the former suit, before the decision thereon can be held to bar the trial of the same issue in a subsequent suit. There is no further condition that the decision on the issue should have been the basis of the decree in the prior suit. Where on a consideration of the whole evidence the Court decides certain issues against the defendant but dismisses the suit on another ground, the decision on those issues operates as *res judicata* in a subsequent suit between the same parties unless it is shown that the findings in the previous suit are wholly inconsistent with the decree or other findings therein.

Krishna Behari Roy v. *Bunwari Lall Roy*, (1875) I. L. R. 1 Cal. 144, P. C. *Varathayyangar* v. *Krishnaswami*, (1887) I. L. R. 10 Mad. 102 Relied on.

Run Bahadur Singh v. *Lucho Koer*, (1885) I. L. R. 11 Cal. 301 distinguished.

Parbati v. *Mathura Nath Banerjee*, (1913) I. L. R. 40 Cal. 29. *Nundu Lall Bhuttacharjee* v. *Bidhoo Mookhy Debee*, (1886) I. L. R. 13 Cal. 17. *Thakur Magundeo* v. *Thakur Magundeo*, (1891) I. L. R. 18 Cal. 647 not followed.

Ramakrishna Naidu v. *Krishnaswami Naidu.* (*Sadasiva Ayyar and Napier, JJ.*) 641

——**Ss. 37, 38**—*Mortgage decree—Execution—Jurisdiction—Decree passed by Additional Munsif's Court having no local Jurisdiction of Court having territorial jurisdiction over mortgaged properties—Additional Court not ceasing to exist—Effect—Decree—Transfer for execution when cannot be made.*

A mortgage decree was passed by the Additional District Munsif of Tinnevelly in respect of properties within the territorial jurisdiction of the Koilpatti Court. The Tinnevelly Court had no local jurisdiction at all, but was established simply to aid the other courts of the District. On a question arising as to whether the Koilpatti Court had jurisdiction to execute the decree under S. 38, C. P. Code when the Additional Court of Tinnevelly had not ceased to exist *held* that the Koilpatti Court had no such jurisdiction unless and until the decree was transferred to it for execution.

C. P. Code—*Contd.* PAGE

An order transferring a decree for execution should not be made so as to evade the provisions of the Limitation Act or to validate an invalid application.

Venkatasami Naik v. *Sivanu Mudali*. (*Ayling and Krishnan, JJ.*) ... 199

——**S. 49 and O. 21, R. 2**—*Decree—Payment by judgment-debtor outside court—Omission to certify payment—Assignment of decree to a person with knowledge of the payment—Assignee executing decree and realising money from judgment debtor — Suit by judgment-debtor for damages against decree-holder and assignee—Cause of action—Suit, if maintainable.*

The first defendant obtained a decree against the plaintiff and the decree amount was paid out of Court by the judgment-debtor. The payment was not certified by the decree-holder nor did the judgment-debtor inform the court, in time, of the satisfaction of the decree. The first defendant afterwards assigned the decree to the second defendant who was aware of the payment by the plaintiff. Subsequently the second defendant realised the amount of the decree by execution, from the plaintiff, the executing Court holding that the prior payment by the plaintiff to the first defendant being uncertified, could not be recognised under O. 21, R. 2 of the Code of Civil Procedure In a suit by the plaintiff for damages against the first and second defendant.

Held, that as against the first defendant the suit would lie as for breach of a promise or of a statutory duty to certify payment to the court under O. 21, R. 2 of the Code of the Civil Procedure ;

that the plaintiff had no cause of action against the second defendant; and that the suit as against the latter should therefore be dismissed.

Krishna Ayyar v. *Savurimutu Pillai*. (*Abdur Rahim, Oldfield and Seshagiri Ayyar, JJ.*) 376

——**S. 64**—*Applicability—Order for attachment of property of Judgment-debtor—Alienation of same by him after order but before actual attachment in pursuance of Or. 21, R. 54—Validity*—Bona *fides of alienee if material—"Attachment has been made." in S. 64—Meaning.*

Where, after an order for attachment of certain immoveable property of the judgment-debtor but before the actual attachment thereof made in the manner provided by O. 21, R 54 of the Code, the judgment-debtor executed a lease.deed in respect of the property, *held* that the lease was not invalid under S. 64 of the Code, because, prior to the date thereof, an attachment of the property had not been made within the meaning of S. 64.

Under S. 64 of the Code no question of the *bona fides* of the alienee arises.

Yuna Ramanayakudu v. *Boya-Pedda Basappa*. (*Phillips and Krishnan, JJ.*) 284

——**S. 92**—*Mosque—Public trust—Evidence of user—Entries in Inam register—Value of—Mutawalli—Breach of trust and neglect of duty—Resumption of inam—Imposition of full assessment—Grant of ryotwari pattah to defaulting mutawalli—Effect of—Trusts Act, S. 88, principle of applicable to public trusts—Hereditary trustee—Breach of trust—Removal of descendants of trustee, if proper.*

The question whether an institution is a public mosque coming within S. 92 of the Civil Procedure Code must, in the absence of express evidence of the terms of the original foundation, be determined by user. The entries in the Inam Register as to the nature of the endowment are good evidence of its public or private character. *Held,* (*Spencer, J.* dissentient) on the evidence in the case, that the suit mosque was a public trust within the meaning of S. 92 of the Civil Procedure Code.

In the year 1798 certain lands were granted in Inam by the Nabob of the Carnatic for the building of a mosque and the performance of certain services and charities in connection therewith. There was nothing to show that the intention of the grantor was to confer any personal benefit on the trustee or manager of the institution. In 1861 the Inam Commissioner during his enquiries found that the conditions of the endowment were all regularly fulfilled and confirmed the original grant, classing the lands as a religious endowment and describing the ancestors of the defendants as managers thereof. In 1893 the Inam was resumed and the lands were fully assessed to revenue by the Government on account of the failure of the defendants who were then the trustees, to perform the religious services for which they had been granted. Ryotwari pattas for the lands were issued in favour of the defendants who continued in possession of the same. In 1915 a suit under S. 92 of the Civil Procedure Code was instituted for removing the defendants from the trusteeship of the mosque and for an account of the income of its endowments. The defendants contended that the effect of the resumption coupled with the issue of ryotwari pattas in their favour, was to put an end to the trust and to vest the lands in them as their absolute property and that the suit was not maintainable.

Held, overruling the plea of the defendant, that the resumption by the Government was of the land revenue alone and that the lands continued to be trust property, subject, however, to the liability to pay the assessment. Assuming that the Government resumed the lands and not merely the assessment and re-granted the lands in favour of the defendents, the latter could only hold the property so acquired subject to the trust, since it was their own breach of trust that led to the resumption and the re-grant. The principle underlying S. 88 of the Trusts Act is a general one and applies to public trusts.

Sikkander Rowther v. *The Secretary of State for India,* (1916) 5 L. W. 402 approved. *Punniah* v. *Aootiama,* (1916) I. L. R. 40 Mad. 939 distinguished.

Where in a suit under S. 92 of the Civil Procedure Code the Court removes a hereditary trustee on the ground of misconduct and appoints fresh trustees, it is not proper to make a provision in the decree debarring the hereditary trustee's decendants for ever from holding the trusteeship.

Per *Spencer, J.*—(dissenting).

Whether the original grant by the Government was of the land or of the revenue alone, resumption implied a taking back of whatever was granted, leaving nothing for the trust. The resumption by the Government and the subsequent issue of ryotwari pattas in favour of the defendants had the effect of putting an end to the trust and vesting the property absolutely

C. P. Code—*Contd.* PAGE

in them. Consequently the defendants were not liable to account for the income of the lands in a suit under S. 92 of the Civil Procedure Code.

Held, further, that having regard to the circumstances connected with the grant and the resumption of the inam, its registration in the name of an individual grantee and not in the name of any institution, and the other evidence in the case, that the suit mosque was not a public trust within the meaning of S. 92 of the Civil Procedure Code.

Muhammad Esuf Saheb v. *Moulvi Abdul Sathar Sahib.* (*Ayling, Kumarasawmi Sastri and Krishnan, JJ.*) 262

———S. 92—*Public trust—"Person having an interest in the trust" meaning of—Hindu temple—Mere right to worship if sufficient to enable a person to sue—Religious Endowments Act,* (*XX of* 1863) *Ss.* 14 *and* 15 —*Scope of,*

Per *Oldfield and Coutts Trotter, JJ.* (Abdur Rahim, J. dissenting). The interest in the trust that is required of a plaintiff by S. 92 of the Code of Civil Procedure is a present and substantial interest and not a remote and fictitious or purely illusory interest. The definition of "persons interested in a temple, mosque," etc., contained in S. 15 of the Religious Endowments Act ought not to be imported into S. 92 of the C. P Code. The question whether any given person has or has not an interest sufficient for the purpose of S. 92, C. P. Code is a question of fact to be decided by the Court having regard to the particular circumstances of each case. A Hindu having a mere right to worship at a temple, is not by reason of that sole qualification, without more, competent to institute a suit for a scheme in respect of the institution under S. 92 of the C. P. Code.

Per *Abdur Rahim, J.* Whether the interest of the plaintiff in a particular foundation or public trust is sufficient to support an action under S. 92, C. P. Code, may to some extent depend upon the facts of each case. It is clear, however, that persons belonging to that section of the public for whose benefit a public trust has been created are in the position of beneficiaries and as such, possess a sufficient interest to support a suit under the Code. In the case of a Hindu temple or Mahomedan mosque, persons entitled to attend there for purposes of worship are presumably the beneficiaries intended by the founder and such persons have an interest in the institution. Consequently it is competent to any person who has a right of attendance and worship at a Hindu temple, to be the plaintiff in a suit under S. 92 of the C. P. Code concerning the institution. If the right of attendance and worship is vested in the plaintiff, the possibility that he may not often or ever, actually worship at the temple, makes no difference as regards his right to sue under S. 92, C. P. C.

The history of legislation on the subject shows that the interest required of a plaintiff by S. 92 of the new C. P. Code, need not be pecuniary, direct or immediate or in any way different from that required by Ss. 14 and 15 of the Religious Endowments Act for purposes of suits relating to temples and mosques.

In re Bedfords, Charities, 2 Swans. 470. *The Corporation of Ludlow* v. *Greenhouse,* 1 Bligh N.S. 17. *John Ali* v. *Ramnath mandal,* (1881) I. L.R. 8 C. 82. *Sajedur Raja Chowdri* v *Gour Mohen Das Baikhnav,* (1897) I. L. R. 24 C 418. *Gopala Muppanar* v. *Subramania Iyer,* (1914) 27 M. L. J. 258 referred to.

C. P. Code—*Contd.* PAGE

Ramachandra Iyer v. *Parameswaram Munpu.* (*Abdur Rahim, Oldfield and Coutts Trotter, JJ.*) 396

———**S. 110 and O. 45, R. 5.**—*Leave to appeal to his Majesty in Council —Single suit on different causes of action against several defendants— Separate appeals by defendants to the High Court—Single appellate decree drawn up—Civil Rules of practice, Rule* 105—*Leave to appeal to the Privy Council—Subject-matter of each appeal to be taken into consideration.*

Plaintiffs sued as next reversioners on the death of the widow of the last male owner, for recovery of possession of several properties which here alleged to have formed part of the estate of the last male owner and which were in the possession of different alienees who were impleaded as defendants. The plaintiffs had really different causes of action against the various defendants but they were allowed, according to a well-established, practice, to join all of them in one suit. The Court of first instance gave a decree in favour of the plaintiffs. The several defendants filed separate appeals to the High Court, as regards the properties in their possession but only one appellate decree was drawn up by the High Court in accordance with Rule 105 of the Civil Rules of Practice. On an application for leave to appeal to the Privy Council against the decision of the High Court in each of the appeals

Held, that leave could be granted only in those cases whose subject-matter was of the value of Rs. 10,000 or upwards under S. 110 of the Code of Civil Procedure.

Vaithilinga Mudaliar v. *Srirangathanni.* (*Wallis, C. J. and Seshagiri Aiyar, J.*) 119

———**S. 115**—Decisions in proceedings under Madras Estates Land Act— Whether High Court has power to interfere in revision ... 571

———**S. 115 and Government of India Act, S. 107**—Collector acting under S. 18 of Land Acquisition Act—Illegal order—High Court— Interference 96

———**O. 21, R. 2**—*Payment out of Court in satisfaction of decree—Omission to certify payment—Application by decree-holder to execute the decree—Breach of implied contract—Suit for damages by judgment-debtor—Cause of action, when arises—Limitation—Limitation Act, Art.* 115, *applicability of—Damages, measure of.*

A decree-holder who receives money outside Court in payment of the decree amount, does so under an implied contract that he would certify that payment as required by law and that he would not execute the decree any more for the amount so paid or realise it again in execution. Where therefore, a decree-holder omits to certify such payment to the Court and applies to execute the decree, he commits a breach of the implied contract which gives rise to a cause of action to a suit for damages by the judgment-debtor. The filing of the execution petition in itself gives rise to a cause of action though no money may have been realised; and successive applications will give rise to successive breaches and fresh causes of action. If money is subsequently realised that will give a fresh cause of action as a further breach of the contract. The amount of damages payable for breach of the contract will be different in each case. Where money is realised from the judgment-debtor in execution over again, that amount

C. P. Code—*Contd.* PAGE

will form the main portion of the damages but where it is not so relaised damages will be awarded only as compensation for any injury caused to the plaintiff and for any loss or expense incurred by him, by reason of the attempt to execute the decree, which ought to have been treated as satisfied. The period of limitation applicable to a suit for damages under the above circumstances, is that provided by Art. 115 of the Limitation Act.

Viraraghava Reddi v. *Subbakka*, (1882) I. L. R 5 M. 397. *Sriramulu* v. *Dalayya*, (1905) 16 M. L. J. 54 followed.

Gopalasami Naick v. *Nammalwar Naick*.—(*Phillips and Krishnan, JJ.*) 175

———**O. 21, R. 63**—*Suit by attaching decree-holder against transferee from judgment-debtor—Transfer in fraud of creditors—Right of individual creditor to sue for avoiding transfer—Representative suit, if necessary—Transfer of Property Act, S. 53—Decree in suits under—Form of—Civil Procedure Code. App. D. Form No. 13.*

Where an attaching decree holder sues under O 21, R. 63 of the Code of Civil Procedure to establish his right to sell certain properties in execution, impeaching a transfer of the same effected by the judgment-debtor in favour of the successful claimant, as being in fraud of creditors, it is not obligatory on the attaching creditor to sue on behalf of all the creditors of the transferor. The attaching creditor has an individual right to sue by himself to avoid the transfer.

Palaniandi Chetti v *Appavu Chettiar*, (1916) 30 M. L. J. 265: *Subramania Iyer* v. *Muthiah Chettiar*, (1917) I. L. R. 41 M. 612; 33 M L. J. 705. dist.

Per *Krishnan, J.* (Obiter) :—A suit by a creditor under S. 53 of the Transfer of Property Act to avoid a transfer by the debtor is not liable to be dismissed on the ground that it is not brought in a representative capacity. To avoid a multiplicity of suits at the instance of numerous creditors, the Court may, of its own motion, and should if moved by the transferee defendant, direct that a suit by a single creditor under S. 53 of the Transfer Property Act, should be amended so as to make it a suit on behalf of all the creditors. Even in a suit by a single creditor, the Court should insert a declaration in the decree that the conveyance in question is void against the plaintiff and all other, if any, creditors of the debtor, in accordance with Form No. 13 of App. D to the Code of Civil Procedure.

Bott v. *Smith*, (1857) 21 Beav. 511; 52 E. R. 957 *Re Mount*, (1899) 1 Ch. 831; *Carnish* v. *Cleark*, (1872) L. R. 14 Eq. 184; *Ideal Bedding Co.* v. *Holland*, (1907) 2 Ch. 157. *Reese River Silver Mining Co.* v. *Atwell*, (1869) L. R. 7 Eq. 347, distinguished.

Re Maddever: *Three Towns Banking Co.* v. *Maddever*, (1884) 27 Ch. D. 523; *Ishwar Timappa* v. *Devar Venkappa*, (1902) I. L. R. 27 B. 146 relied on.

Pokker v. *Chandrankandi Kunhamad.* (*Ayling and Krishnan, JJ.*) ... 231

———**O. 21, R. 89**—*Application by judgment-debtor who had executed a private sale-deed of the properties—Sale-deed not registered—Right of judgment-debtor if affected by the execution of a registered conveyance subsequently to application.*

A judgment-debtor whose property had been sold in Court-auction, conveyed it by a private sale to a third person and then applied under O. 21, R. 89 of the C.P. Code, to set aside the sale. On the date of the

C. P. Code—*Contd.* PAGE

application the sale deed had not been registered though the time for its registration had not expired. Subsequent to the application, the judgment-debtor executed another conveyance of the property to the same third person and got it registered The Court below rejected the application of the judgment-debtor on the ground that he had no interest in the property on the date of the application, by reason of his having executed a conveyance which could be registered at the option of the vendee on the date of the application.

Held, reversing the decision of the Court below, that notwithstanding the execution of the prior unregistered conveyance, the judgment-debtor continued to be the owner of the properties so as to entitle him to apply under O. 21, R. 89 of the C. P. Code and that the execution of a subsequent registered conveyance would not deprive the judgment-debtor of a relief to which he was entitled on the date of the application.

Subbarayudu v. *Lakshminarasamma*, (1913) I. L. R. 38 M. 775. *Ishar Das* v. *Asaf Ali Khan*, (1911) I. L. R. 34 A. 186. distinguished.

Kurri Veerareddi v. *Kurri Bapi Reddi*, (1906) I. L. R. 29 M. 336. *Ramanathan* v. *Ranganathan*, (1917) I. L. R. 40 M. 1134. rel. on.

Sethuramaswami Nayani Varu v. *Syed Mir Hussain Sahib.* (*Seshagiri Aiyar and Phillips, JJ.*) 298

————**O. 22, Rr. 3 and 5**—Objection under—Should be taken at once... 164

————**O. 34 Rr. 2 and 4**—*Mortgage—Decree for sale—Interest subsequent to date fixed for redemption—Rate of interest—Contract Act, S. 74—Provision for enhanced interest in a mortgage bond, in default of payment on the due date—Not a penalty in the circumstances of the case.*

Where the mortgaged property was to be sold on default of redemption by the mortgagor within the period prescribed by the preliminary decree, the mortgagee-decree-holder is entitled to subsequent interest on the aggregate amount consisting of the principal, interest and costs declared or found to be payable on the date fixed for redemption. Such further interest is ordinarily to be calculated at 6o/o but the Court has a discretion in the matter.

Where a mortgage bond provided for payment of the principal money with interest at 9 % on a particular date and in default, for payment of interest at 12% and it was found that the mortgagor had with the moneys raised by the mortgage, discharged debts carrying interest at 12 % and more, *held* that the provision in the mortgage bond as to the payment of enhanced interest was not penal.

Venkatachallapathi Aiyar v. *Thavasi Servai.* (*Abdur Rahim and Oldfield, JJ.*) 288

————**Schedule II**—*Applicability—Suit—Reference to arbitrators including presiding Judge—Validity—Award by majority and decree thereon—Final and binding nature of decree—Effect of reference in such cases.*

Where the parties to a suit pending before a Subordinate Judge agreed to refer the questions of fact and of law arising in the case to the decision of three persons, *viz.*, the Subordinate Judge and two friends of the parties, an award was made by the majority; and a decree was passed thereon by the Subordinate Judge notwithstanding the objections of the defendant to the award, *held* that the second schedule to the Code had no

C. P. Code—*Contd.* [PAGE

application to the case, that the reference and the award were not illegal on the ground that one of the arbitrators was the Judge himself and that the decree passed on the award was final and binding on all the parties.

Per *Chief Justice.*—A reference of a suit to the presiding Judge must be held to be altogether *extra cursum curiae* and not the less so when two others are joined with him, and the decree passed in accordance with their decision must be regarded as a consent decree, and as not subject to the provisions of the second schedule.

Per *Seshagiri Aiyar, J.*—Where parties have chosen to entrust their case to a Judge and two others, they must be deemed to have agreed to accept the decision of that body as final and as not being open to the attacks to which otherwise a judgment is liable.

Chinna Venkatasami Naicken v *Venkatasami Naicken.* (*Wallis, C. J. and Seshagiri Aiyar, J*) 292

———**Sch. II, Para. 1**—*Arbitration—Reference to—Validity—*Ex parte *defendant interested in reference not being a party to same—Effect—"Person interested"—*Ex parte *defendant, if a.*

A defendant who is *ex parte* may be a party interested within the meaning of Sch. II, Para. (1) of the Code of Civil Procedure.

Where an *ex parte* defendant, who was interested in the whole suit as well as in the particular subject-matter of the reference, was not a party to the same, *held* that the order of reference was *ultra vires* and without jurisdiction.

Polita Pavana Panda v. *Narasinga Panda.* (*Oldfield and Seshagiri Aiyar, JJ.*) 538

Company—*Compromise or arrangement with creditors—Sanction of Court—Date from which compromise or arrangement sanctioned by Court becomes binding—Indian Companies Act,* 1913 (*Act VII of* 1913) *S.* 153.

The compromise or arrangement contemplated by S. 153 of the Indian Companies Act, 1913 (Act VII of 1913) becomes binding from the date when it is arrived at, subject to subsequent sanction by the Court. If that sanction be refused, the agreement is without effect; but if sanction be given, the agreement takes effect not from the date of sanction, but from the date when it is made.

Raghubar Dayal v. *The Bank of Upper India Ltd.* (*Viscount Haldane.*) ... ...P. C. 526

Companies Act—See under Indian Companies Act.

Contract—*Consideration—Forbearance to sue, though not for a specified period—Whether can support a security bond after the execution of promissory note—Charge on immoveable property to secure payment of a sum of money—Purchaser of immoveable property without notice of the charge—Whether takes subject to the charge—Distinction between mortgage and charge.*

Where a promissory note for a certain sum is executed and a few days later, the maker of the promissory note executes a security bond charging immoveable properties in favour of the payee for the same sum in consideration of the latter's forbearance to sue though not for a specified period, such security bond is supported by good consideration.

An act of forbearance on the part of the creditor, though it may not be for a definite period is a good consideration for a fresh contract based on it,

Contract—*Contd.* PAGE

Alliance Bank v. *Broom*, (1864) 2 Dr. and Sm. 289=34 L. J. Ch. 256. *Fullerton* v. *Provincial Bank of Ireland*, (1903) *A. C.* 309. *Glegg* v. *Bromby*, (1912) 3 *K. B.* 474 referred to.

Where there is a charge of immoveable property to secure payment of a sum of money supported by consideration, a purchaser of the immoveable property although without notice of the charge, takes it only subject to the charge.

Distinction between mortgage and charge pointed out by *Sadasiva Aiyar, J.*

Srinivasa Raghava Aiyangar v *Ranganatha Aiyangar*. (*Sadasiva Aiyar and Spencer, JJ.*) 618

Contract Act—See under Indian Contract Act.

Court Fees Act, 1870 (Act VII of 1870) Ss. 6, 7—Construing of—Object—Securing of revenue—Notional Valuation for purposes of court fees—Whether it affects jurisdiction—Suits Valuation Act, S. 8 ... 487

Court of Wards Act, 1879 (Bengal Act IX of 1879) Ss. 6, 9—Disqualification of proprietors under Court of Wards Act, not a ground for extending period of limitation 210

Criminal Procedure Code, S. 4 (p)—"Officer in charge of police station"—meaning of—Person assisting an officer in a search 252

———**S. 144**—Order under prohibiting user of a highway by a person or body of persons—No proof of special damage—Right to sue for a declaration of right and injunction against persons threatening to obstruct 76

———**Ss. 195 and 476**—*"Any offence referred to in S. 195," meaning of—Whether those words incorporate the conditions laid down in S. 195 for taking cognisance of the offence by a Court.*

The words "any offence referred to in S. 195" in S. 476 of the Criminal Procedure Code refer not merely to the offences specified in S. 195 but also incorporate the conditions laid down in S. 195 for taking cognisance of the offence by a Court.

Govinda Iyer v. *Emperor*, (*Wallis, C. J., Ayling and Kumaraswami Sastri, JJ.*) ....F. B. 448

———**S. 195 (1) (b) and (c)**—*Sanction for prosecution—Court granting sanction not to express any opinion on the merits of the case—Insolvency proceedings—Affidavit filed by claimant before Official Assignee—Sanction to prosecute claimant—Power of Court to grant.*

The true interest of the accused requires that the judge who gives sanction should abstain from giving anything like an analysis of the materials submitted to him for the purpose, or expressing any opinion as to the probability or otherwise of a conviction. All that a judge in giving sanction is called upon to do is to feel that the matter is one which on the face of it, requires investigation by a Magistrate.

Krishnamma v. *Chitturi Chinna Perraju*, (1914) 17 M. L. T. 15 relied on; observations of *Seshagiri Iyer, J.*, in *Palaniappa Chettiar* v. *Ramaswami Chettiar*, (1916) 32 M. L. J. 54 dissented from.

The High Court in the exercise of its insolvency jurisdiction, can sanction the prosecution of a claimant in insolvency proceedings, in respect of statements contained in an affidavit filed by him before the Official Assignee, in support of his claim. The claimant is a party to the

Cr. P. Code—*Contd.* PAGE

proceedings before the Court within the meaning of S. 195 (1) (c) of the Criminal Procedure Code.

Hajee Mohamed Habibulla Badsha Sahib In re, (*Coutts Trotter, J.*) ... 60

———**S. 196**—*Scope and construction—Sanction to prosecute—What amounts to—Sanction to actual words of complaint not necessary.*

It is not necessary, under S. 196 Criminal Procedure Code, that the actual words of the complaint should be sanctioned by the Government.

Chidambaram Pillai v. *Emperer*, (1908) I. L. R. 32 M. 3 referred to.

Where Government sent a telegram to a District Magistrate expressly authorising the Public Prosecutor of the District to file a complaint against V under S. 124 A. I. P. C., and to act immediately if the District Magistrate thought it advisable after consulting him and directed the District Magistrate to submit the complaint prepared " for issue of Supplemental sanction," *held* that the authority given was a perfectly valid authority, that the words referring to the issue of supplemental sanction must be read apart from the rest of the order and did not intend to refer back to the first portion of the telegram or to limit the authority given and that a complaint filed in pursuance of the authority contained in the telegram but without any special sanction therefor was not open to the objection that it was not authorised by Government.

Per *Napier, J.*—S. 196 must not be construed with the strictness of an enabling section, but, as being a disenabling section, must be read simply as requiring the specific authority of Government for institution of the proceedings and nothing more. *Barindra Kumar Ghose* v. *Emperor*, (1907) I. L. R. 37 C. 467 dissented from.

Varadarajulu Naidu In re. (*Phillips and Napier, JJ.*) ... 64

———**Ss. 239, 435 and 436**—Joint preliminary enquiry by magistrate—Legality of—Sessions Judge directing case to be committed to Sessions, when offence not exclusively triable by his Court—Order illegal. 291

———**Ss 269, cl. (3) 307 ; 309**—*Trial for two charges, one of which triable by jury and other by Sessions Judge with aid of assessors—Reference under S. 307—Non-compliance with S. 309 in regard to offence triable with assessors—Effect.*

In a case in which an accused was tried for two offences, one of which was triable by jury, and the other by the Sessions Judge with the aid of assessors, *held* that the circumstances that the Judge disagreed with the verdict of the jury on the charge triable by jury and desired to make a reference under S. 307, Criminal Procedure Code, did not absolve him from complying with the requirements of S 309 as regards the offence tried by him with assessors.

Kamhala Narayan In re. (*Sadasiva Aiyar and Napier, JJ.*) ... 452

———**S. 476**—*Termination of Judicial proceedings—Commission of offence coming to the knowledge of the Court later—Whether Court can pass order under S. 476.*

Where the commission of an offence has been discovered by a Court after the judicial proceedings have terminated, the Judge cannot pass an order under S. 476 of the Criminal Procedure Code, although the facts of the case are fresh in his mind.

Rahimatulla Sahib v. *Emperor*, (1907) I.L.R. 31 Mad. 140. *and Aiyakannu Pillai* v. *Emperor*, (1908) I. L. R. 32 Mad. 49 followed.

Per *Kumaraswami Sastri, J.* :—It is open to the court to act in such

Cr. P. Code—*Contd.* PAGE
cases under S. 195 of the Criminal Procedure Code and direct an officer to file a complaint.

Padmanabha Hebbara In re. (*Wallis, C. J., Ayling and Kumaraswami Sastri, JJ.*) ... ...F. B. 852

Damages—*Proof of damages—Extent of evidence required—Indefiniteness of evidence, no ground for awarding nominal damages only.*

The difficulty of estimating damages is no ground for refusing to fix them, or for giving nominal damages only. If the party whose duty it is to prove damages does not give the best evidence every presumption should be made against him: if there is any range, the range should be taken against him: but this does not relieve the Court altogether of the duty of assessing the damages as best it can on evidence and materials actually before it.

Joseph v. *Shew Bux.* (*Lord Phillimore*) ... ...P. C. 151

————Suit for by judgment-debtor for breach of implied contract by decree-holder to certify payment under O. 21 R. 2 C. P. C—measure of damages 175

Declaratory Suit—Order under S. 144 Cr. P. C. Prohibiting a person or body of persons from using a highway for procession—No proof of special damage—Cause of action for declaratory suit... ... 79

Deed—Construction—Mortgage by conditional sale—Sale with covenant to reconvey 161

————Inam title deed—" Besides Poramboke "—Construction of ... 203

Election—*Doctrine—Scope and applicability—Basis—Quantum of compensation if material on question of applicability of doctrine—What constitutes election.*

A, who was managing the properties inherited by the daughter of his deceased brother, died leaving a will whereby he bequeathed a portion of those properties to *B* and a sum of Rs. 800 to his neice. In a suit brought by the neice to recover the properties inherited by her and bequeathed to *B* and also the legacy of Rs 800, *held* that the doctrine of election applied to the case notwithstanding that the neice would get an absolute right in the sum bequeathed to her while *B* would take only her life interest in the properties bequeathed to him.

Held, further, that the fact that the neice took possession of the immoveable properties in execution of the decree therefor in her favour did not constitute an election when in the appeal against the decree she claimed the money in addition.

Scope of the doctrine of election considered.

Ammalu Achi v. *Ponnammal Achi.* (*Seshagiri Aiyar and Napier, JJ.*) 507

Escheat—Death of mulgenidar without issue—His rights, if escheat to government 207

Estoppel—Reversioner taking mortgage from alienee from a Hindu widow—Whether it precludes him from subsequently questioning alienation 493

Evidence Act (1 of 1872) **S. 114** (g)—*Presumption—Summons by opposite party for production of account books alleged to bear upon the case—Omission to produce them and failure to explain for non-production—Effect—Hindu Law—Joint trading family—Debt contracted by manager—Presumption as to binding nature or otherwise—Onus of proof.*

Where in a suit on a promissory note executed by the deceased

Evidence Act—*Contd.* PAGE

manager of a Hindu trading family, the surviving members raised the plea that the amount of the note was not borrowed for purposes binding on family, and, though summoned by plaintiffs to produce their books alleged to contain entries showing that the amount was utilised in the family business and that the debt was treated as a family debt, the defendants, relying upon the weakness of the direct evidence for plaintiffs, neither produced the books nor explainedfor their failure to produce, them nor even went into the witness box.

Held, that (1) there was, under S. 114 (*g*) of the Evidence Act, a presumption that the books if produced would have been unfavourable to the defence case; (2) the presumption was clear enough to shift the burden and to throw on the defendants the onus of proving that the debt in question was not incurred for joint family purposes.

Quære: whether, in such a case, the onus is not on the defendants to prove that the debt was not borrowed for family purposes.

Murugesam Pillai v. *Manickavasaka Desika Gnana Sambanda Pandara Sannadhi*, (1917) I. L. R. 40 M. 402=32 M L. J. 369 P. C. relied on. *Raghunathji Tarachand* v. *The Bank of Bombay*, (1909) I. L. R. 34 B 72 referred to.

Guruswami Nadar v. *Gopalsami Odayar*. (*Wallis, C. J., and Ayling, J.*) 561

Fraudulent Transfers—*Tests to be applied in determining the genuineness or otherwise of a transaction which is impeached—Facts must be weighed as a whole—Books of account —Mere regularity or book entries not of much value.*

In determining whether a particular transaction impeached as a fraud upon creditors is genuine or otherwise it is essentially necessary that the facts should be considered in relation to each otherand weighed as a whole. It is a fallacious method to consider separately each fact which miliates against the *bona fides* of the transaction, and which by itself may be susceptible of explanation.

In the present case the secrecy and haste with which the document was executed, the subsequent negotiations for a composition with the creditors on a payment by them to get the mortgage effected by the document revoked, the non-production of material books, the unsatisfactory nature of the evidence as to the settlement of accounts on which the mortgage was based, the relationship of the parties, and the reservation of the entire usufruct of the immovable properties for the wife and children of the debtor, were held by their lordships to prove irresistibly that the mortgage was in fraud of creditors.

The mere formal regularity of entries in books of account, is in such cases of little value.

Seth Ghunsham Das v. *Uma pershad.* (*Mr. Ameer Ali*) ...P. C. 488

Grant—Gift to Hindu females — Rule of construction—Absence of words empowering Alienation by donee—Nature of Estate taken by donee 306

———Jivai—Zemindar's reversion on failure of male heir—May be divested by adoption by widow 511

Guardian — Contract by, on behalf minor and for his benefit — Personal Liability of minor 29

Guardians and Wards Act, S. 4 (2) 41 (3) 46 (2) (c) (1) and 48 — De facto *guardian—Whether guardian within the meaning of S.* 4 (2)—

Guardians and Wards Act—*Contd.* PAGE

Appointment or declaration as guardian—Court competent to require a de facto guardian to deliver infant's properties to the guardian appointed or declared under the Act—S. 48 does not cover " requisition " under S 41 (3).

A *de facto* guardian is a guardian within the meaning of S. 4 (2) of the Guardians and Wards Act.

A *de facto* guardian is *ipso facto* removed from guardianship under S. 7 (2) by the Courts order appointing a guardian.

The Court has power under S. 41 (3) of the Act to require a *de facto* guardian to deliver the infant's properties to the guardian appointed under the Act.

The expression "orders made under the Act" in S. 48 of the Act does not cover the case of a "requisition" under S. 41 (3) and a separate suit will lie to contest the propriety of the requisition under S. 41 (3).

Seetha Bai v. *Radha Bai* (*Ayling and. Krishnan, JJ.*) ... 189

———Ss. 34 and 35—*Surety bond under S. 34—Right to sue on—Assignment by Court, when principal bond lost, if valid—Breach of the conditions of the bond, what constitutes—Remedy in case of breach.*

The Court is the obligee under a bond executed by sureties under S. 34 (a) of the Guardians and Wards Act and is alone entitled to sue on the bond in the absence of an assignment in due form of law. The fact that the principal bond executed by the guardian is lost would not prevent the surety bond being duly assigned.

In a suit by the assignee of a surety bond under S. 35 of the Guardians and Wards Act, it was found that the bond had been assigned by the judge on the ground that there was a *prima facie* case of maladministration against the guardian though there had been no order of the Court directing the guardian to exhibit accounts or to pay or apply the balance found due under S. 34 cl. (b) to (e) of the Guardians and Wards Act. *Held* that there was no breach of the conditions of the bond and that their suit was not maintainable

Obiter:—In the case of bonds under the Guardians and Wards Act, the proper procedure would be to get an order to pay against the Guardian under S. 34 (d) or a decree against him, and if he fails to satisfy the order or decree, then to sue the sureties in respect of this breach as to which there will be no defence and the period of limitation is that prescribed by Art. 68 of the Lim. Act except where the bond charges immoveable property.

Krishna Chettiar v. *Venkatachella Chettiar* (*Wallis C. J. and Seshagiri Aiyar, J.*) 114

Highway—*Right to use for processions—Criminal Procedure Code, S. 144—Order under, prohibiting user of the highway by a person or body of persons—No proof of specical damage—Right to sue for a declaration of right and for an injunction against persons threatening obstruction.*

An order of a Magistrate under S. 144 of the Criminal Procedure Code forbidding a person or body of persons from using a highway for the purpose of procession, invests the person or persons interdicted with a cause of action if they allege it to be an infringement of their legal rights, though such order be in itself *intra vires* and no special damage be alleged or proved.

PAGE

Highway—*Contd.*

It is competent to a person or body of persons who claim a right to go in procession along a public highway to bring a declaratory suit to establish that right against a person who threatens to obstruct it without allegation or proof of special damage.

Cases on the subject discussed.

Valan Pakkiri Taragan v. *Subbayan Samban.* (*Chief Justice, Ayling and Seshagiri Aiyar, JJ.*) ... ...F. B. 79

Hindu Law—*Adoption—Widow's power of adoption—Not dependent on her inheriting husband's estate—Adopted son, his rights—Divesting of estate by adoption—Jivai grants—Zemindar's reversion on failure of male heir—May be divested by adoption.*

The right of a Hindu widow to make an adoption to her deceased husband is not dependent on her inheriting his estate. She can exercise the power, so long as it is not exhausted or extinguished, even though the property was not vested in her.

It is an explicit principle of Hindu law that an adopted son becomes, for all purposes, the son of his father, and that his rights unless curtailed by express texts, are in every respect the same as those of a natural born son.

Semble, that the only express text contracting the heritable rights of an adopted son refers to the case of his sharing the heritage with an after born natural (aurasa) son.

Hindu lawyers do not regard the male line to be extinct or a Hindu to have died without male issue until the death of the widow renders the continuation of the line by adoption impossible.

By the custom of a family in the Ahmedabad. District jivai or maintenance grants were made out of the impartible family estate to younger sons, with reversion to the estate upon failure of male heirs, widows not inheriting. In October 1903 the last holder of such a grant died without male issue, but leaving a widow In March 1904 she adopted a son to him.

Held, that the son inherited the jivai grant.

Pratapsing Shivsing v. *Thakor Shri Agarsinghji Raisinghji.* (*Mr. Ameer Ali*) ... ...P. C. 511

———Adoption by widow with the assent of Sapindas in the Dravida Country—Assent of nearest kinsmen necessary, whether family undivided or divided—Rights to property not to be disregarded ... 40

———*Father's debts—Binding nature on sons—Proof of immorality by the sons—Whether satisfied by showing father had no trade or business and his income was sufficient and that he was leading an immoral life—Appropriation of payments—Whether creditor entitled to appropriate payments without specific direction—Interest up to date and balance for portion of the principal.*

When a Hindu son seeks to escape liability for the debts contracted by his father on the ground that they were contracted for immorality, he ought to show by reasonable proof that there is a connection between the debts and the immoral purpose.

The immoral character of the debts is not proved by showing that the father was leading an immoral life that the income of the family was sufficient for the family needs and that there was no trade or business necessitating the borrowing of loans. *Ram Nath* v *Balaji Ram,* (1912) 17 I. C. 735 not followed.

Hindu Law—*Contd.* PAGE

A creditor is entitled to appropriate the various payments by the debtor made without specific directions in full satisfaction of the interest due till the respective dates of payment and the balance in discharge of the principal *pro tanto.*

Dhulipalla Butchayya v. *Kuppa Venkatakrishnayya.* (*Sadasiva Aiyar and Spencer, J.J.*) 295

———*Gift of immoveable property to a temple on occasions of marriage or death—Whether requires registration under S. 123 of the Transfer of Property Act—Manager of a joint Hindu family, whether has power to make a gift to a temple—Binding nature of the gift on the junior members.*

A gift to a temple of immoveable property by a Hindu on the occasion of a marriage or death does not come within the terms of S. 123 of the Transfer of Property Act and need not therefore be by a registered instrument.

In such a case the gift is not to any sentient being real or artificial, so as to attract S. 5 of the Transfer of Property Act.

The various modes of dedication to Hindu deities considered. *Mannu Lal* v. *Radhakishenji,* (1916) 36 I. C. 989 dissented from.

In the performance of religious obsequies, the manager of a Hindu family is competent to make a gift of property to a temple and such a gift is binding on the junior members of the family

Ramalinga Chetty v. *Sivachidambara Chetty,* (*Seshagiri Aiyar and Phillips, JJ.*) ... ...

———*Gift to females—Rule of construction—Settlement in favour of adopted son and wife of settlor—Absence of words empowering alienation by donee—Nature of estate taken by donee—Right of wife to dispose of properties by will.*

Where a husband gives property to his wife and the words of the gift are sufficiently clear there is no presumption that the donee takes only a limited estate. *Surajmani* v. *Rabi Nath Ojha,* (1907) I. L. R. 30 All. 84 P. C relied on.

The rule laid down by the Privy Council in *Mahomed Shamsool Huda* v. *Shewakram,* (1874) L. R. 2 I. A. 7 is a rule of construction to be applied only when there is some uncertainty or ambiguity in the language of the instrument of gift.

A Hindu, on adopting a son, executed a settlement of his properties by which he provided for the payment of certain moneys and allowances in favour of his relations and made a gift (inam) of the remainder of his properties, half to the adopted son and a fourth to each of his two wives. The material portion of the settlement deed was as follows:—" Of the remaining property the apopted boy is to be entitled to and enjoy one-half. Of the remaining half, these two persons, my senior wife S. K. and my junior wife S. T. shall each take a half." *Held,* on a construction of the document, that each of the wives of the settlor took an absolute estate in the fourth share of the properties given to her by the settlement.

It is competent to a widow who acquires property absolutely under a gift or settlement from her husband, to dispose of the same by will.

Bhujanga Rau v. *Ramayamma,* (1884) I. L. R. 7 M. 387. *Nannu Meah* v. *Krishnasawami,* (1890) I. L. R. 14 M. 274 dissented from.

Hindu Law—*Contd.* PAGE

Surajmani v. *Rabi Nath Ojha,* (1907) I. L. R. 30 A. 84 *and Fatechand* v. *Rup Chand* (1916) I. L. R. 38 A. 446 relied on.

Ramachandra Rao v. *Ramachandra Rao.* (*Wallis, C. J. and Seshagiri Aiyar, J.*) 306

——*Joint Family—Member of—Alienation for valuable consideration—What is—Gift of family property in pursuance of promise in consideration of marriage—Validity—Contract Act S. 2—"Consideration"—Meaning.*

A gift made in pursuance of a promise in consideration of marriage is an alienation for valuable consideration within the rule of Hindu Law. The definition of "consideration" as given in S. 2 of the Contract Act is general and wide enough to cover such cases.

A, a member of a joint Hindu family consisting of himself and his adopted son settled a portion of the family property on the husband of his foster daughter in pursuance of a promise to that effect made just before the marriage but after the date of the adoption, and in consideration of the marriage. On a question arising as to the validity of the settlement, *held* that it was an alienation for valuable consideration within the rule of Hindu Law and was valid to the extent of the settlor's share.

Nanjundasamy Chetty v. *Kanagaraiu.* (*Abdur Rahim and Oldfield, JJ.*) 242

——Joint trading family—Debt contracted by manager—Presumption as to binding nature or otherwise of 568

——*Mitakshara—Adoption by widow in the Dravida country with assent of Sapindas—Whose assent is necessary—Position of a widow in an undivided family—Case of a divided family—Assent of nearest kinsmen equally necessary—Rights to property not to be disregarded.*

Under the Dravidian branch of the Mitakshara Law, in the absence of authority from her deceased husband, a widow may adopt a son with the assent of his male agnates. This was established in the Ramnad case. (*Collector of Madura* v. *Mutu Ramalinga Setupathy.* (1868) 12 M. I. A. 397.

In the case of an undivided family, the consent must be obtained by the widow within that family: if the father-in-law is alive from him, if not, from the deceased husband's brothers. The assent of separate and remote kinsmen is insufficient.

The principle is the same if the husband dies separate from his kindred. The widow must still obtain the assent of her father-in-law, if he be dead, of the divided brothers or the other nearest Sapindas. In considering what assent is sufficient, rights of property cannot be disregarded: and the widow cannot be allowed to adopt on the assent of remoter relations when there are nearer ones in existence.

Kandukuri Veera Basavaraju Pantulu v. *Kandukuri Balasurya Prasada Rao Pantulu.* (*Mr Ameer Ali*)... ... P. C. 40

——*Mitakshara—Joint family—Money borrowed by manager of joint family at high rate of interest—Legal necessity—Necessity for exceptional terms—Burden of proof.*

It is incumbent on those who support a mortgage made by the manager of a joint Hindu family to show not only that there was necessity to borrow, but that it was not unreasonable to borrow at some such high

Hindu Law—*Contd.* PAGE

rate and upon some such terms, and if this be not shown the rate and terms cannot stand even though the charge be upheld.

All terms of the mortgage in excess of necessity are outside the scope of the manager's authority.

Nawab Nazir Begam v. *Rao-Raghunath Singh.* (*Lord Phillimore*) P. C. 521

———Mitakshara joint family—Sale of family properties by manager—Subsequent sale by junior members of his share therein—Obstruction by prior purchaser to subsequent purchaser taking possession—Litigation by latter for recovery of property ending unfavourably—Suit to recover sale price and expenses of litigation—Maintainability—Limitation 157

———Transactions with females—Duty of purchasers to ascertain the extent of their powers—Contingent reversioner joining in a deed of sale—Estoppel 68

———*Widow's estate—Widow's powers of surrender and alienation distinguished—Surrender must be absolute—Consent of reversioner to alienation by widow, effect of—Reversioner taking mortgage from alienee—Whether it precludes him from subsequently questioning alienation.*

A distinction must be drawn between a Hindu widow's power of surrender or renunciation, and her power of alienation for necessity.

A Hindu widow can renounce in favour of the nearest reversioner, if there be only one, or of all the reversioners nearest in degree. In this case she accelerates the estate of the heir by conveying absolutely and destroying her life-estate. But such surrender must be not only absolute but complete, the reason being that it is based on the effacement of the widow. Such surrender can only be in favour of the nearest reversioner or reversioners.

An Alienation may be in favour of anyone, but to prevail beyond the widow's life-time it must be for necessity.

The consent of the reversioners to an alienation by the widow does not operate *proprio vigore* to validate it, but it affords presumptive proof of necessity. Such presumption can however be rebutted.

Held, therefore, that a deed of gift by the widow could not be validated by any consent of the reversioners.

A presumptive reversioner is not bound to challenge an alienation by a widow at its inception : he is entitled to wait till the reversion falls in.

By taking from the alienee a mortgage of property which includes part of the property alienated such a reversioner does not preclude himself from disputing the validity of the alienation on the widow's death.

Bajranji Singh v. *Manokarnika Baksh Singh*, (1907) L. R. 35 I. A. 1=30 All. 1=17 M. L J. 605 discussed.

Rangasami Gounden v. *Nachiappa Gounden.* (*Lord Dunedin*). ... P. C. 493

——— *Widow—Whether her husband's reversioner is her legal representative—Abatement of suits—Civil Procedure Code (Act V of 1908)—Order 22, Rules 3, 5.*

A Hindu widow may so deal with the income of her husband's estate as to make it an accretion to the corpus. It is a question of fact to be determined, if there is any dispute, whether a widow has or has not so

Hindu Law—*Contd.* PAGE

dealt with her property. If she has so dealt with it the next reversioner may be her legal representative with regard to it.

An objection under Order 22, Rule 5 should be taken at once.

Raja Rajeswara Dorai v. *Sundara Pandiyasami Tevar.* (*Lord Phillimore*) ... ... P. C. 164

Illegal search—*Action for—Criminal Procedure Code Act V of* 1898, S. 4 (*p*) *"Officer in charge of a police station." meaning of—A person assisting an officer in a search, whether liable for illegal search.*

If a person is deputed to be in charge of a police station in the absence of the permanent incumbent, the fact that he was doing duty within the limits of the jurisdiction of the police station but outside the station house, does not deprive him of his capacity of station house officer

The aim of S. 4 (p) of the Criminal Procedure Code, is to bring in more men, so that the duties of the officer may be performed without delay and not to exclude persons who are either permanent incumbents or who have been appointed to act for the permanent incumbents

A person who assists in the conduct of a search by a police officer entitled to make a search under the Criminal Procedure Code is not liable in damages for an illegal search.

Asan Allidr Marikayar v. *Masilamani Nadar.* (*Seshagiri Ayyar and Phillips, JJ.*) 252

Inam—*Grant of whole village—Poramboke—Burning grounds—Rights of grantee—Ownership vested in Government in trust for communal purposes—Construction of " besides poramboke " in Inam title-deed.*

Notwithstanding the grant of a whole village including poramboke, as a sarvamanyam inam the ownership of certain kinds of poramboke, *e.g.*, burning grounds, temple-sites, public roads, etc, does not pass to the grantee but continues to vest in the Government as legal owner in trust for communal purposes. The Government being the custodian of the right of the public in respect of these porambokes, could not be deemed to have permanently assigned over such property to individuals for their private use without a derogation from the trust. The meaning of the words " besides poramboke " in the inam title deed should not be understood as an acknowledgment by the Government of the Inamdar's title to all kinds of poramboke in the village.

Secretary of State for India v. *Raghunatha Thatachariar*, (1912) 24 M. L. J. 31. *Narayanaswami Naidu* v. *The Secretary of State for India* (1912) 24 M. L. J. 36 ref. to.

Venkatarama Sivan v. *The Secretary of State for India.* (*Sadasiva Aiyar and Spencer, JJ.*) 208

Indian Companies Act, 1913 (Act VII of 1913) S. 153—Compromise or arrangement with creditors—Date from which compromise or arrangement sanctioned by court becomes binding 526

Indian Contract Act, S. 2—" Consideration "—Meaning—Gift of family property in pursuance of promise in consideration of marriage ... 242

———S. 74—Permanent Agricultural lease—Breach of covenant against alienation—Provision for re-entry—Forfeiture—Whether S. 74 can be invoked to relieve against 367

———S. 74—Provision for enhanced rate of interest in a mortgage bond, in default of payment on the due date—penalty circumstances of the case 288

Indian Paper Currency Act. PAGE

Indian Paper Currency Act, S. 26—*Provision—Hundi payable to bearer on demand—Validity of hundi drawn on a banker—No money with the banker on the date of the hundi—Intended deposit—Whether hundi saved by the proviso to S. 26—Endorsement by the payee of a hundi—Whether endorser estopped from disputing the validity of the hundi—Negotiable Instruments Act, Ss.* 120 *and* 122.

Where a hundi is drawn with the name of the payee as the creditor and the drawer as the debtor entered on the top of the hundi and the language of the hundi is as follows: " the money with Rangoon current rate of interest should be paid on demand to the person who brings this by the Rangoon firm".such hundi offends against the provisions of S. 26 of the Paper Currency Act and a suit is not maintainable on the same.

Where such a hundi is drawn on a banker even though the banker has no money of the customer on the date of the hundi if a deposit to meet it is intended, the hundi is saved by the proviso to S. 26.

Per *Seshagiri Aiyar, J., Semble,* the endorser of a negotiable instrument is estopped as against the endorsee from setting up that the instrument is invalid Ss. 120 and 122 of the Negotiable Instruments Act and the English law considered.

Arunachallam Chettiar v. *Narayanan Chettiar.* (*Seshagiri Aiyar and Phillips, JJ.*) 301

Indian Stamp Act, (Act II of 1899) S. 19—*Promissory note executed outside British India—Suit on—Whether promissory note admissible in evidence without the proper stamp*

A promissory note executed outside British India can be sued on in British India and is admissible in evidence, without the proper Indian stamp being affixed to the same.

Simulu Ebrahim Rowthan v. *Abdul Rahiman Mahomed.,* (1898) 8 M. L. J. 182. *Mahomed Rowthan* v *Mahomed Husain Rowthan* (1899) I. L. R. 22 Mad. 337; 9 M. L. J. 135 followed.

Kunhi Coya Haji v. *Assan Bava Haji* (*Seshagiri Aiyar, J*) ... 188

Interest—*Post diem interest—Mortgage bond—Principal and interest repayable on a fixed date—Agreement to pay interest on unpaid arrears of interest—No provision for* post diem *interest—Liability of debtor—Extent of.*

Post diem interest is recoverable on the general promise by the debtor to be liable for interest, though a definite term is fixed in the bond for repayment of the principal and interest If the liability under the general undertaking to pay interest is further extended, by what may be styled an appurtenant undertaking to pay interest upon arrears of interest and such further undertaking is found in the same document following the provision for payment of interest, it might be assumed that the parties intended that both the principal and the appurtenant undertaking should govern the liability of the debtor for *post diem* interest.

Mathura Das v. *Raja Narendra Bahadur,* (1896) I. L. R. 19 A 39 =6 M. L. J. 214 *Bindersri Naik v. Ganga Saran Sahu* (1897) I. L. R. 20 A. 171, *Ghantayya* v. *Papayya* (1989) I. L. R. 23 M. 534. *Ramanathan Chetty* v. *Nur Muhmamad Marcayar* (1900) 11 M. L. J. 183 foll.

Narasimhayya v. *Srinivasayya.* (*Sadasiva Aiyar and Spencer JJ.*) ... 118

Interest—*Contd.* PAGE

————*Right to, in case not covered by the Interest Act* (*XXXII of* 1839) —*Suit by Mahomedan heir for share of assets—Right to interest.*

The Interest Act is not exhaustive of all claims to interest and it is open to the Courts in India to award interest, in a proper case, independently of the provisions of that Act.

Authorities on the subject reviewed. A Mahomedan minor sued for the recovery of her share of her father's assets from her co-heirs who had utilised the assets to their own advantage. *Held*, that the plaintiff was entitled, in addition to her share to simple interest at the ordinary rate of six per cent. per annum, on the amount of her share of the assets from the date of her father's death.

Muhamad Abdul Gaffur Rowther v *Hamida Beevi Ammal.* (*Ayling. and Sashagiri Aiyer, J J.*) 456

Jagirs; grant, of—Prima facie *are for life only—but may be in such terms as to make the jagir hereditary—Estate of inheritance must be granted in unambiguous terms—Putrapoutradi, its meaning—does not necessarily import an estate of inheiritance descending to collaterals.*

A jagir must be taken *prima facie* to be an estate only for life It may be granted in such terms as to make it hereditary but the terms must be unambiguous and must clearly show whether it was the grantors intention that the right of inheritance should be general or should be confined to particular heirs.

The words *putrapoutradi* in the grant of jagir at all events outside Bengal—do not necessarily import an estate of inheritance descending to collaterals.

Ram Lal Mukherjee v. *Secretary of State for India in Council* (1881) L. R. 8 I. A. 46=I. L. R. 7 Cal. 304, and *Lolit Mohun Singh Roy* v. *Chukkn Lal Roy* (1897) L. R, 24 I. A. 76=I. L. R. L. 24 Cal. 834 distingished.

Ram Narayan Singh v. *Ram Saran Lal* (*Sir John Edge* ...P. C. 344

Jurisdiction—High Court—Insolvency proceedings—Affidavit filed by claimant before Official Assignee—Sanction to prosecute claimant ... 60

————High Court—Original Side—Power of judge to modify minutes before formal order is drawn up 28

————Mortgage Decree by Additional District Munsiff's Court which has no territorial jurisdiction—Court having territorial jurisdiction over mortgaged properties—Execution—Court which passed decree not ceasing to exist—Transfer for execution 199

————Order by official referee—Disobeying of—Jurisdiction of Court to commit for contempt—Original Side rules, R 119 Madras ... 461

————Registered lease for ten years granted before the Madras Estates Land Act (I of 1908)—Suit to eject tenant in Revenue Court on expiry of lease—Jurisdiction to entertain—Award mesne profits—Legality 248

————Small Cause Court—Suit for specific performance by the vendor of land against vendee 89

————*Valuation of suit—Notional as distinct from real value of subject-matter of Suit—Whether it affects jurisdiction—When objection to jurisdiction should be taken—Special jurisdiction of Subordinate*

Jurisdiction—*Contd.* PAGE

Judges in Bombay—Court Fees Act, 1870 (*Act VII of* 1870) *Ss.* 6, *and* 7—*Suits Valuation Act* 1887 (*Act VII of* 1887) *S.* 8—*Bombay Civil Courts Act*, 1869 (*Act XIV of* 1869) *Ss* 24, 27—*Practice of valuing prayer for declartory decree at Rs.* 130 *condemned.*

Objections to jurisdiction should be taken at the earliest possible moment.

When a notional value, different from the real value) is placed upon property for the purposes of the Court Fees Act, such notional value cannot displace the real value for the purposes of jurisdiction.

The Court Fees Act has no other object than to secure revenue and its provisions should be construed accordingly.

The practice which has grown up in Bombay of valuing a prayer for a declaration at Rs. 130 (as being the value on which the fee nearest to Rs. 10 would be leviable) has no warrant in law and is inconvenient.

Rachappa Subrao Jadhav Desai v. Shidappa Venkatarao Jadhav Desai. (*Sri Lawrence Jenkins*) 437

Land Acquisition—*Compensation—Valuation Principle—Land acquired subject to occupancy rights of tenants on land—Effect.*

The proper mode of valuing, for the purpose of the Land Acquisition Act, land in which tenants have occupaney rights is to ascertain what would be the market value of the land if it were put to the most lucrative use, having regard to its condition, etc., the value of the occupancy rights of the tenants being left to be ascertained afterwards. The difference between the market value and the value of the tenants interest represents the landlord's interest.

The Rajah Pittapuram v. *The Revenue Divisional Officer, Cocanada* (*Wallis C. J. and Kumaraswami Sastri, J.*) 455

Land Acquisition Act I of 1894—Ss 18 (1); 3 (b)—"*Person interested*" *in S.* 18 (1)—*Meaning—Application for reference by person claiming interest in compensation—Order rejecting, on ground of no interest—Nature of—Revision by High Court—Jurisdiction—C.P.C.—S.* 115—*Government of India Act—S* 107—*Applicability—Jurisdiction of collector under S* 18 *of Land Acquisition Act.*

By virtue of S. 3 (b) of the Land acquisition Act, the expressson "any person interested" in S. 18 (1) of the Act includes a person *claiming* an interest in the compensation. As long, therefore, as an application under S. 18 of the Act sets out a claim to an interest in the compensation, it is no part of the collector's duty to decide whether the claim is well founded. and he is not authorised to refuse to make the reference merely because he may think it is not.

In rejecting an application under S. 18 a collector acts judicially and his order, if illegal, is subject to revision by the High Court under S. 115 of C P.C. or S. 107 of the Government of India Act.

The Administrator General of Bengal v. *The Land Acquisition Collector* (1906) 12 C.W.N. 241. *followed.*

Best & Co. v. *Deputy Collector of Madras* (1916) 20 M.L.T. 388. dissented from.

Parameswara Iyer v. *Acquisition Collector, Palghat.* (*Ayling and Krishnan JJ.*) 95

Landlord and Tenant. .. PAGE

Landlord and Tenant—*Land-law of Madras—Acquisition of occupancy rights—Estate—Permanently settled estate or temporarily settled Zemindars—Formal settlement necessary—Madras Estates Land Act,* 1908 (*Mad. Act I of* 1908), *Ss.* 3, 6, 8.

The settlement referred to in the definition of "estate" in the Madras Estates Land Act, 1908 (Madras Act I of 1908), S. 3. must be effected formally and there must be some recorded evidence of it.

Where therefore certain Government lands were transferred to a Zemindar in lieu of monetary compensation or reduction of revenue for the acquisition by Government of other lands forming part of a settled estate, and it was sought to infer therefrom a settlement of the new lands.

Held, that no such inference should be made and that there was nothing to give the new lands the character of a settled estate.

Zemindar of Sanivarappet. v. *Zemindar of South Vallur* (1916) I.L.R., 39 Mad. 944 affirmed but on different grounds to those assigned by the Madras High Court.

Raja Parthasaradhi Appa Rao v. *Raja Bommadevera Satyanarayana.* (*Lord Dunedin*) ... ... P. C. 279

———*Inam grant of an Agraharam village by Indian Ruler—Kudivarani and melvaram — Jurisdiction of Civil Courts — Ownership of the soil of land in India—Whether in the Ruler or in the cultivator—Estate—Madras Estates Land Act,* 1908, (*Madras Act I of* 1908) *S.* 3, *Sub-sec.* 2 (*d*).

The ownership of the soil of land in India has always been in the Sovereign or Ruler for the time being. The fact that the Rulers generally collected their land revenues by taking a share of the produce is not evidence that the soil was not vested in and could not be granted by them, but rather supports the contrary assumption.

The presumption in the case of a grant by native ruler is that not merely the land revenue but the soil itself, subject to rights if any of then existing occupants, was granted.

The owners of an inam village known as a *sarva agraharam* held under a gift made to their predecessors by a Reddi King in 1378. The grant was not forthcoming, but it was proved that these and similar inamdars had always regarded themselves and been regarded as full owners and had treated the actual cultivators as tenants at will. These latter now claimed to have permanent rights of occupancy and in suits for ejectment brought by their landlords pleaded that the agraharam was an "estate" under S 3 (2) of the Madras Estates Land Act 1908, (Madras Act I of 1908) and that the jurisdiction of the Civil Courts was thereby ousted :

Held, by the Privy Council (reversing the High Court) that in the case of a lost inam grant there is no presumption that the grant was of the revenue only ; that the agraharam was not an "estate" within the meaning of the said section ; and that the Civil Courts had jurisdiction to entertain the suits.

Landlord and Tenant—*Contd.* PAGE

Suryanarayana v. *Potanna*, (1913) I. L. R. 33 Mad. 608 reversed.

Adusumilli Suryanarayana v. *Achuta Pothanna*. (*Sir John Edge*,) P. C. 585

———*Occupancy rights of tenants—Private and ryoti lands—Acquisition of occupancy rights under Madras Act I of 1908—Actual possession at the commencement of that Act the test—Madras Estates Land Act*, 1908 (*Madras Act I of* 1908) *Ss* 6, 185—*Madras Act IV of* 1909, *S*: 3.

Under S. 6 of the Madras Estates Land Act, 1908 (Madras Act I of 1908) as explained by S. 3 of Madras Act IV of 1909 every person who having held land as a ryot continues in possession of such land at the commencement of Act I of 1908 obtains a permanent right of occupancy in such holding, even though his possession at the commencement of the act was without the consent or against the wishes of the landholder.

Semble, that such right acquired by the tenant in possession even though a decree for possession has been passed against him.

Govinda Parama Guruvu v. *Bothasi Dandasi Pradhanu* (1910) 20 Mad. L. J. 568 ref.

Raja Yerlagadda Mallikharjuna Prasad v. *Rajulapati Somayya*. (*Sir John Edge*) ... ...P.C. 257

———*Permanent settlement—Right to minerals—Grant by Zamindar of tenure in lands within Zamindari—Does not pass right to minerals by implication—Express words necessary—Same principle applicable to rent-free tenures.*

Where a Zamindar grants a tenure in lands within his Zamindari, and it does not clearly appear by the terms of the grant that the right to the minerals is included, the minerals do not pass to the grantee.

Sashi Bhushan Misra v. *Jyoti Prashad Singh Deo* (1916) L. R. 442 A. 46 followed.

It is immaterial that the tenure granted by the Zamindar is a rent-free tenure ; the same rule applies.

Raghunath Roy Marwari v. *Raja of Jheria* (*Sir John Edge*). ...P. C. 660

——— Rates of rent—Contracts implied from bare payment and acceptance of rent—Proof of consideration—Madras Rent Recovery Act, S. 11 ... 49

——— *Forfeiture—Denial of landlord's title—Refusal to perform service —Breach of ceremonial observance.*

The repudiation of a landlord's title by the tenant will in certain circumstances work a forfeiture. This is not the ancient Indian Law, but has been adopted by the Courts from the law of England, and is now embodied in the Transfer of Property Act, 1882, S. 3 of which merely gives statutory form to a rule already in force.

The denial which operates a forfeiture must now be by matter of record before institution of any suit for forfeiture, and must be in clear and unmistakable terms.

Semble, that the breach of ceremonial observance prescribed in a grant is not now a cause of forfeiture or resumption, at any rate where the grantor is a subject, and not the Government.

A pargana within appellant's Zamindari was held under a patta which provided that the holder should pay a rent of Rs 15,000 and attend the Zamindar at the Dassara Durbar with 500 paiks for service. The holder in 1904 refused in writing to pay rent of Rs. 15,000 or to attend at the

Landlord and tenant—*Contd.* PAGE

Durbar, and alleged that the pargana was an independent Zamindari, subject only to a rent of Rs. 2,200.

Held, that no forfeiture was incurred, as there was no denial of title by matter of record before suit instituted, and the service refused was a subsidiary consideration and of no substantial benefit to the landlord.

Maharaja of Jeypore v. *Sri Rukmini Pattamashadevi Garu.* (*Lord Phillimore*) ... ... P. C. 543

———*Permanent lease prior to the coming into force of the Transfer of Property Act—Assignee of the title of the lessor in a permanent lease—Lessee denying the title of—Whether lease forfeited—Whether notice to take advantage necessary preliminary to ejectment.*

Where the plaintiff, the assignee of the lessor's interest in a permanent lease, of the year 1889 sued in ejectment against the permanent lessee, the ground that the permanent lease was forfeited by the lessee's denial of the plaintiff's title. *Held*, that the plaintiff was entitled to succeed though he had not given any notice that he would take advantage of the forfeiture.

A permanent heritable tenancy can be forfeited by a denial of the landlord's title.

Rama Iyengar v. *Gurusami Chetti* (1918) 35 M. L. J. 129 *Kally Dass Ahiri* v. *Manmohini Dassi* (1897) I. L. R. 24 Cal. 440 followed.

The denial of a derivative title, as that of the plaintiff in the present case can work a forfeiture of the tenancy.

Durga Kripa Roy v. *Sri Janoo Lathak*, (1872) 18 W. R. 465 dissented from.

Rama Iyengar v. *Gurusami Chetty*, (1918) 35 M. L. J. 129 followed.

In the case of leases prior to the coming into force of the Transfer of Property Act where there is a forfeiture by disclaimer of the landlord's title, no separate preliminary act on the part of the landlord is necessary to enable him to maintain a suit in ejectment.

Rama Iyengar v. *Gurusami Chetty* 35 M. L. J. 129 followed.

Venkata chariar v. *Rangasami Aiyar.* (*Sadavia Aiyar and Spencer, JJ.*) . 532

———*Land tenure of Punjab—Permanent tenures — Facts raising presumption of permanent tenure—Whether such presumption arises in temporarily settled districts.*

Although the origin of a tenancy may not be known, yet if there is proved the fact of long possession of the tenure by the tenants and their ancestors the fact of the landlord having permitted them to build *a pucca* house upon it, the fact of the house having been there for a very considerable time, of its having been added to by successive tenants, and of the tenure having from time to time been transferred by succession and purchase, in which the landlord acquiesced or of which he had knowledge, a Court is justified in presuming that the tenure is of a permanent nature.

A Caspars v. *Kedar Nath Sarbadhikari* (1901) I. L. R. 28 Cal. 738 approved.

Semble, that there may be permanent tenancy as between subjects even in parts of India where there is no permanent settlement.

Musammat Afzalunnissa v. *Abdul Karim* (*Lord Dunedin*) ... P. C. 580

Lease—*Nature of—Suit for possession by lessee—Premium not paid—Right to possession by lessee—Implied covenant—Transfer of Property Act, Ss. 105, 108 (b) and (c).*

Lease—*Contd.* PAGE

Under a registered lease deed, the plaintiffs, lessees claiming thereunder, were to pay off a prior encumbrance (hypothecation) on the land and make some other payments. The plaintiffs did not discharge the encumbrance. The hypothecatee sued and obtained a decree. The lessor-owner thereupon usufructuarily mortgaged the property, and from the money so raised satisfied the decree. The plaintiffs now sued for possession impleading the lessor and the usufructuary mortgagees.

Held, that they were entitled to possession and that the non-payment of the premium was no answer to their suit for possession.

A lease is a transfer of a right to enjoy property, and the right of the lessees to be put into possession arises from the words of the demise which imply that the right to possession is granted to the lessee and the lessor, is not entitled to refuse to give up possession to the lessee unless the document provides that the latter is not to have possession until the fulfilment of a certain condition.

Kandasami Pillai v. *Ramasami-Mannadi.* (*Abdur Rahim, Oldfield and Coutts Trotter JJ*) 313

Legal representative—*Suit against a person in possession of the estate of the deceased debtor, such person not being the real heir—Binding nature of the decree and execution proceedings on the real heir.*

Where a decree is passed for a debt due by a deceased debtor in a suit brought against a person in possession, but who is not the heir, of the deceased debtor's estate the decree and the proceeding in execution of such decree bind the interest of the real heir: such a case is an exception to the general rule that proceedings in execution of a decree do not bind the interest of any person who was never brought on the record as a party to the proceedings in the suit.

Gnanambal Ammal v. *Veeraswami Chetty,* (1915) 29 M. L. J 698 explained.

Bachu Socrayya v. *Toomuloori Chinna Anjaneyalu.* (*Sadasiva Aiyar and Spencer, J.J.*) 106

Lessor and Lessee—*Permanent agricultural lease—Breach of covenant against alienation, Provision for re-entry—Forfeiture—Power of courts to relieve against—English and Indian law—Transfer of Property Act, Ss.* 111 *and* 114—*Principle of if applicable to agricultural leases—Contract Act, S.* 74 (*as amended by Act VI of* 1899)—*Effect.*

A court has no power, either under the general law or under S. 75 of the Contract Act (as amended), to relieve against a provision in a permanent agricultural lease for re-entry by the landlord on breach of a covenant against alienation by the tenant.

In enacting S. 114 of the Transfer of Property Act the Indian Legislature did not adopt the provisions of S. 14 of the Conveyancing Act but adhered to the older English doctrine that a court of equity could not relieve against a right of re-entry or forfeiture under any provision or stipulation in a lease for a breach of any covenant in the lease except the covenant for payment of rent.

Barrow v. *Isaac and Son* (1891) 1 Q. B. 417, 425 relied on.

Per *Chief Justice* (*Napier J.* dissenting). The provisions of Ss. 105 to 116 of the Transfer of Property Act are not applicable *proprio vigore* to agricultural leases but, in the absence of any special reason for not applying

Lessor and Lessee—*Contd.* PAGE

them, the courts when dealing with agricultural leases, are bound to adopt those provisions as embodying rules of justice, equity and good conscience.

Krishna Shetti v. *Gilbert Pinto. (Wallis, C. J., Napier and Kumaraswami Sastri, JJ.)* 367

Letters Patent (Mad)—*Clause* 15—*Judgment—Order as to costs—Order passed on review of taxation by taxing officer under rules* 37 *and* 38 *of Original Side Fees Rules—Appeal.*

An order as to costs is not the less a judgment with in the meaning of clause 15 of the Letters Patent because it relates to costs only *Tulliaram Row* v. *Alagappa Chettiar* (1910) I. L. R. 35 M. 1 followed.

An appeal lies from an order of the Judge passed on review of taxation by the taxing officer under rules 37 and 38 of the Original Side Fees Rules.

Kulasekkara Naicker v. *Jagadambal Ammal, (Wallis, C. J.* (F. B) *Ayling and Kumaraswami Sastri, JJ.)* 351

Limitation—Claim by Mahomadan heirs, whether a joint cause of action 184

———*Disabilities entitling persons affected to extended period of limitation—Disqualification of proprietors under Court of Wards Acts—Not a ground for extending period of limitation—Court of Wards Act.* 1879 (*Bengal Act IX of* 1879) *Ss*, 6, 9.

The Limitation (Act Act IX of 1908) recognizes and enumerates certain conditions as legal disabilities entitling the persons affected by them to an extended period of limitation. But this enumeration is exhaustive. The fact that a properietor has been declared disqualified to manage his own property under a Court of Wards Act and thereby debarred from suing is not one of the recognised disabilities and does not therefore suspend or modify the ordinary law of limitation.

Rani Kuar Mani Singh Mandhata v. *Nawab of Murshidabad, (Sir Lawrence Jenkins)* ... ...P. C. 210

———*Patni Taluq—Sale for arrears of rent—Reversal of sale—Decree reversing sale—Whether its operation is suspended by an appeal—Remedies of purchaser at patni whose sale is set aside—Is the remedy provided by S.* 14 *of the Patni Regulation exclusive—Bengal Patni Taluqs Regulation* (*VIII of* 1819) *Ss.* 14, 15—*Indian Limitation Act.* 1877 (*Act XV of* 1877) *Sch. II. Arts,* 62, 97.

A patni taluq was sold for arrears of rent under Bengal Regulation VIII of 1819. The sale was reversed under S. 14 of the Regulation on August 24. 1905: the decree reversing it was affirmed on appeal on August 3, 1906. The purchaser was a party to the proceedings but was awarded no indemnity under S. 14. The purchaser remained in possession till August 28, 1906. On September 14, 1908, he sued the Zamindar (who had brought the taluk to sale) to recover (inter alia) so much of the purchase money as the zemindar had received.

Held; (assuming, but not holding that the suit was competent and that it was one " for money paid upon an existing consideration which afterwards fails") that time ran from August 24, 1905, and that the suit was barred by the Indian Limitation Act 1877, Sch. II. Art. 97.

Semble, that such a suit would really fall under Art. 62,

Limitation—*Contd.* PAGE

Under the Indian Law and procedure an original decree is not suspended by presentation of an appeal nor is its operation interrupted where the decree on appeal is one of dismissal.

S. 14 of the Bengal Patni Taluqs Regulation (Regulation VIII of 1819) imposed on the Court, in a suit against the Zamindar for the reversal of a sale under the Regulation, the imperative duty of indemnifying the purchaser against loss. To discharge this duty a distinct issue should be framed as between the purchaser and the person chargeable under the section whether, in case the sale is reversed, the purchaser has suffered any and what loss against which he ought to be indemnified by that person.

Quaere whether the remedy provided by S. 14 in a purchaser's favour does not exclude all other remedies even apart from any determination of such an issue.

Hukum Chand Boid v. *Pirthichand Lal Chowdhury.* (*Sir Lawrence Jenkins*) ... ...P.C. 557

———Starting point—"Levied" in S. 14 of Madras Land Encroachment Act—meaning of 222

———Surety bond under S. 34 of Guardian and Wards Act—Order to pay by guardian not satisfied—Suit against sureties—Limitation Act, Art. 68 114

———(**Act IX of 1908**), **S. 2 (4) Art 124**—*Suit for the recovery of a hereditary office of archaka—Defendant and his predecessors claiming to be appointed by the trustees of the temple—Defendant in possession of the office for less than 12 years—Possession by defendant and his predecessors for more than 12 years—Plaintiff's suit whether barred—Whether 'defendant' includes predecessors.*

A suit by a hereditary archaka of a temple to recover his office is barred by limitation under article 124 of the Limitation Act where the plaintiffs is out of possession of the office for more than 12 years and the defendant, the archaka in possession, and his predecessors claiming under a title by successive appointments by the trustees have been in possession all the time even though the defendant may have been in possession for less than 12 years.

The term 'defendant' in the third column of article 124 includes the predecessors of the defendant though holding office under successive appointments.

Krishnaswami Thathachariar v. *Veeraswami Mudali.* (*The Chief Justice and Krishnan, J.*) 93

———**Ss. 9 and 15**—*Suit upon promissory note executed by person subsequently adjudged insolvent—Limitation—No right to deduct time during which insolvency proceedings were pending.*

The defendant executed a promissory note in favour of the plaintiff's assignor in April 1910. In October 1910 defendant applied to be adjudged an insolvent and was so adjudged in December 1911. In July 1914 the adjudication was annulled because there was a composition with the creditors. The plaintiff brought a suit on the note in July 1915 claiming to deduct the time during which the insolvency proceedings were pending under S. 15 of the Limitation Act.

Held, that the effect of the order of adjudication was not to stay all proceedings against the insolvent but merely to impose on the plaintiff

Limitation—*Contd.* PAGE

the necessity of obtaining leave to sue from the Court under S. 16 (2) of the Provincial Insolvency Act and that the suit was barred by limitation.

Soni Ram v. *Kanhyia Lal* (1913) I. L. R. 35 A. 227=25 M. L. J. 131. *Dorasami Padayachi* v *Vaithylinga Padayachi* (1917) 33 M. L. J. 46 relied on.

Ramaswamy Pillai v. *Govindaswami Naicker.* (*Seshagiri Aiyar and Phillips, JJ.*) 104

——S. 12—*Appeal—Limitation—Time requisite for obtaining copies —Meaning—Application before vacation—Copy ready during vacation —Delivery taken on re-opening day—Gazette notification notifying arrangements for delivering copies during vacation—Period between date on which copy ready and date of delivery if to be excluded or included.*

Where the application for copies of the decree and judgment to be appealed against was made before the summer vacation, the copies were ready on 21-5-17 during the vacation, but delivery thereof was taken only on 25-6-17, the re-opening day, though a notification had been published in the Gazette in accordance with Chapter XV Rule 12 of Rules and Orders for Civil Courts that in such cases arrangements would be made for granting copies during the vacation, *held*, in a second appeal preferred against the said decree and judgment, that the period from 21-5-17 to 25-6-17 could not be considered as part of the period requisite for obtaining copies within the meaning of S 12 of the Limitation Act and that appellant was not entitled to a deduction of the said period

Nachiyappa Mudali v. *Aiyaswami Aiyar* (1882) I. L R. 5 M. 189 (F. B.) followed.

Komuru Appalaswami v. *Palli Narayanaswami.* (*Phillips and Napier, J J.*) 62

——S. 12 (2) and (3)—*Computation of time for the purpose of appeal—Long vacation of the Lower Court—Notification that copies will be supplied in the long vacation—Whether the period of the vacation can be excluded.*

Where a notification is published that copies will be granted during the long vacation, the whole period of the long vacation cannot be excluded as the period for granting a copy of the judgment or decree; on the other hand, the period for the vacation must be reckoned in computing the period of limitation. *Mohideen Saheb* v. *Abbubukar Saheb.* (*Phillips and Kumaraswami Sastri, JJ.*) 122

——Arts. 62, 97—Sale of patni taluq for arrears of rent—Reversal of sale—No indemnity provided for purchaser—Suit by purchaser for recovery of purchase money—Limitation 557

——Art 115—*Applicability—Hindu Law—Joint Family Mitakshara—Sale of family properties by manager—Subsequent sale by junior member of his share therein—Obstruction by prior purchaser to subsequent purchaser taking possession—Litigation by latter for recovery of property purchased ending unfavourably—Suit by him thereafter for recovery of sale price and of expenses of litigation—Maintainability—Limitation—Cause of action—Right to expenses of review petition.*

A, the purchaser from a junior member of his share in joint family properties, attempted to take possession thereof, but was resisted by a prior purchaser of those properties from the manager of the family. A then instituted a suit for the recovery of the share purchased by him and

Limitation—*Contd.* PAGE

the litigation was carried up to the High Court whose decision was against him. A petition filed by him for a review of the judgment of the High Court was also dismissed within 3 years of the date of the judgment of the High Court but more than 3 years after the date on which he was refused, A instituted a suit for the recovery of the sale price and of the costs incurred in the unsuccessful litigation. *Held*, (1) that the suit was not barred by limitation as the consideration for the sale failed only on the date of the High Court decision and the cause of action for the suit arose only on that date; and (2) that plaintiff was entiled to the costs of his unsuccessful litigation except the costs of his review petition.

Hanuman Kamat v. *Hanuman Mandur*, (1891) I. L. R. 19 C. 123 P. C. expld. and distd., *Subbaraya* v. *Rajagopala*, (1914) I. L. R. 38 M. 887. *Venkataramayya* v. *Lanka Ramabrahman*, (1918) 35 M. L. J. 124 refered to.

Sarwothama Row v. *Chinnasami Pillai*, (*Sashagiri Aiyar and Phillips, JJ.*) 157

——**Art 115**—Omission to certify payment under O. 21 R. 2 C. P. C.—Application to execute decree—Suit for damages by Judgment—Debtor—Cause of action, when arises 175

——**Arts 127 and 144**—*Exclusion from joint family property*—*Possession by individual members of specific items of property Whether amounts to exclusion of the other members —Co-tenancy--Possession by a co-tenant of a specific portion of the property—Adverse possession—English and Indian Law on the subject reviewed.*

In the case of joint family property, to bar the right of the plaintiff under Art. 127 of the Limitation Act, there must be exclusion from the whole of the joint family property: and mere exclusion from Specific items of joint family property will not suffice. *Vishnu Ramachandra* v. *Ganesh Appaji Chaudhari* (1895) I. L. R. 21 Bom 325 dissented from.

In the case of a tenancy in common, the possession by one co-tenant of a specific portion of the property does not amount to adverse possession as against the other co-tenants in absence of clear evidence of ouster.

Per *Seshagiri Aiyar, J*:—The history of the law in England and in India as to adverse possession among co-tenants reviewed.

Kumarappa Chettiar v. Saminatha Chettiar. (*Chief Justice and Seshagiri Aiyar, J.*) 612

Madras District Municipalities Act (IV of 1884) S. 53—*Profession tax levy of—Carrying on business within the municipality, what constitutes.*

The Clan Line Steamers Ltd, an incorporated Company having their registered office and principal place of business in Glasgow, owned a line of steamers plying between English ports and the East. The Clan Line Steamers called at Cocanada in the Godavari District, to take in cargo for Europe and also to unload cargo consigned to Cocanada of which there was very little. They were represented at Cocanada by Messrs Ripley & Co., sub-agents engaged by Messrs. Gordan Woodroffe & Co, the Clan Line's agents at Madras. Ripley & Co., had no authority to contract with shippers at Cocanada for the allotment of cargo space, applications for which were usually made to Gordon Woodroffe & Co., at Madras. If, however, the shippers applied to Ripley & Co., the latter forwarded the application to be dealt with by Gordon Woodroffe & Co., or took their instructions by telegraph if time was short, Ripley & Co., issued shipping

Madras District Municipalities Act—*Contd.* PAGE

orders to shippers who had secured space, signed the bills of lading in advance, settled the bills of the dubash employed by Gordon Woodroffe & Co., to supply the ship with necessaries and paid the doctor who was similarly employed. Ripley & Co., also collected any freight that might be payable on the small quantity of cargo, landed at Cocanada. *Held,* that the activities of the Clan Line Steamers Ltd., at Cocanada did not amount to such an exercise of their trade or carrying on business within the municipality as to make them liable to pay profession tax in Cocanada under S. 53 of the Madras District Municipalities Act.

Grainjer and Son v. *Gough,* (1898) A. C. 325, *Lowell and Christmas Ltd.* v. *Commissioner of Taxes,* (1908) A. C. 46 relied on.

The Municipal Council of Cocanada v. *The "Clan Line" Steamers Ltd.* (*Wallis, C. J. and Napier, J.*) 226

——**S. 188, Cl. (1) (b)**—*Scope and applicability—Cl. (1) "Livery stable"—Meaning.*

Under clause (1) of S. 188 of the Madras District Municipalities Act of 1884 a license ought to be taken out for keeping such a place as that indicated in the clause in all cases in which the element of letting out on hire is involved in the use of the place.

A stable is a "livery-stable" within the meaning of sub-clause (1) of Clause 1 of S. 188 whether the number of horses kept in it for hire is one or more than one.

The Public Prosecutor v. *Mahomed Sheriff Saheb.* (*Sadasiva Aiyar and Napier, JJ.*) 27

Madras Estates Land Act (I of 1908), Ss 3, 6, 8—"Estate"—Formal settlement necessary—Lands granted to a Zamindar in lieu of monetary compensation for acquisition of lands forming part of a settled estate... 276

——**Ss. 3 Cl. 11 (a) 143**—*Cesses, legality—Tests of—Kanganam Kulavettu—Melvaram Urai—Kudivaram Urai—Swathantram—Kangovi—Tiruppani—Kattalavuasi—Ayyanar—Nature and legality of.*

On a consideration of the evidence adduced in the case, their lordships held that the following cesses were legal and were payable by the ryots......Kanganam; Kulavettu; Melvaram Urai, Kudivaram Urai; Swathantram; and thrashing ground-rent in cases where the tenants had no thrashing floor. Their lordships held that the following cesses were illegal;—Kattalâvuvasi; Kangovi; Ayyanar; and Tiruppani.

Nature of the above mentioned cesses explained.

Discussion of principles on which legality of cesses is to be determined.

Thiruvanatha Sevuga Pandia Thevar v. *Sankaramoorthi Naidu.* (*Phillips and Kumaraswami Sastri, JJ.*) 109

——**Ss. 6 185**—Madras Act IV of 1909, S 3—Acquisition of occupancy rights—Private and ryoti lands—Actual possession at the commencement of the Act, the test 257

——**S. 13 (3)**—*Landholder and ryot—Rent—Right of landholder to claim enhanced rate for garden crops raised by ryot with water from wells dug at their own expense—Implied contract supported by consideration—Presumption of, from payments for a long series of years—Ramnad Zemindari—Custom of rent being charged only on cultivated lands and not on waste lands—Legality of.*

Madras Estates Land Act —*Contd.* PAGE

Where the ryots of a Zemindari raised garden crops on dry lands with the aid of water from their own wells, the Zemindar claimed rent according to the garden rates which was higher than the ordinary dry rate on these lands. It was found that for a long time garden rates had been paid by the ryots on the lands so cultivated. On a question being raised as to whether an agreement to pay the higher rate, supported by consideration, could be inferred from such long continued payments.

Held per *Chief Justice*—A Court can infer a contract supported by consideration, to pay rent at an enhanced rate from a long continued course of payment of the enhanced rate if that is the sole fact that the Court has to go upon. But in dealing with the question of presuming the agreement and the consideration therefor that together make up a contract, the Court should not be governed by that fact alone but should come to a conclusion on all the circumstances of the case.

Per *Ayling, J*:—The imposition of garden assessment where rent had previously been paid at dry rates is an enhancement of rent. Where it is sought to base liability to pay such enhanced rent on an alleged contract to pay, a Court cannot infer consideration for the contract solely from a long-continued course of payment of the enhanced rent.

Per *Coutts Trotter, J*:—If the long continued payment of rent were the sole fact before the Court, it would be entitled to presume consideration from it; but if there are other facts before the Court it must refuse to treat the payment as raising a presumption and while giving it such weight as it thinks fit, perhaps a determining weight, treat it merely as a portion of the evidence in the case subject to be weighed against and perhaps overstopped by the evidence on the other side.

Per *Seshagiri Iyer, J*:—A course of payment, if nothing else appears, may be an element to be considered in arriving at the conclusion whether there was consideration for it or not, but if there was a fixed payment before and the rate was enhanced solely because the tenant has cultivated new crops by his own exertions, there is no room for presuming consideration under such circumstances.

Per *Kumaraswami Sastri, J*:—It is open to the Court from a long and uniform course of payment to presume that there was an agreement to pay which had a lawful origin and was supported by consideration, where it is satisfied that it would be unreasonable from laps of time or other circumstances to call upon the landlord to give direct evidence as to the circumstances that gave rise to the payment, and when circumstances exist which would render the drawing of the presumption reasonable in law and probable in fact. If all that appears is a long course of payment there is no reason why the presumption should not be drawn.

Arumugam Chetty v. *Raja Jagavera Rama Venkateswara Ettappa*, (1905) I. L. R. 28 M. 444. *Raja Jagavera Rama Venkateswara Ettappa* v. *Alwarasa Asari*, (1918) 36 M. L J. 49 (P. C.) *Goodman* v. *Mayor of Saltash*, (1882) L R. 7 A. C. 623. *Gann* v. *Free Fishers of Whitstable*, 11 H. L. C. 193 referred to.

Per *Ayling and Krishnan, JJ.*—According to a custom prevalent in some parts of the Ramnad Zemindari the land-holder is entitled to charge rent only for lands cultivated by the ryots and the latter are not liable to pay rent for lands left uncultivated for any reason other than their own neglect. Such a custom is neither unreasonable nor opposed to law.

Madras Estates Land Act.—*Contd.* PAGE

Arunachalam Chettiar v. *Mangalam*, (1915) 40 M. 540=31 M. L. J. 168 followed.

Periakaruppa Mukkandan v. *Raja Rajeswara Sethupathi.* (*Wallis, C.J., Ayling, Coutts Trotter, Seshagiri Aiyar and Kumarasawami Sastri, JJ*) F.B. 320

———**Ss. 131, 192 and 205**—*Order passed under S.* 131—*Whether High Court has power to revise the order—Interference by the High Court—Civil Procedure Code, S.* 115—*Deposit on the last day prescribed by S.* 131, *impossible by the absence of the presiding officer—Deposit made next day, whether satisfies the requirements of S.* 131.

The High Court has power under S. 115 of the Civil Procedure Code to revise the decisions in all suits, appeals and other proceedings under the Madras Estates Land Act. This power also extends to cases where the Collector and the Board of Revenue have powers of revision under S. 205 of the Act.

In a case where the petitioner has applied the Collector and the Board of Revenue, the High Court will decline to interfere, unless it is imperatively called on to do so to prevent a miscarriage of justice.

Where on the last day of the period prescribed by S. 131, the defaulting ryot finds it impossible to get his deposit received in consequence of the absence of the Deputy Collector, a deposit made on the next day will satisfy the requirements of S. 131.

Ramaswami Goundan v. *Kali Goundan.* (*Ayling and Krishnan, JJ.*) 571

———**S. 153**—*Proviso—Amendment Act, IV of* 1909, *S.* 8—*Effect—"Old waste"—Registered lease for ten years granted before Act—Suit to eject tenant under Revenue Court—Jurisdiction—Award of mesne profits in suit—Legality, S.* 153—*Proviso—Effect—C. P. Code, O.* 8, *Rr.* 3 *and* 5—*Allegation in plaint not traversed in written statement—Effect.*

In a suit brought in a Revenue Court by a land-holder under the Madras Estates Land Act to evict the defendants on the expiry of the registered lease in their favour granted on 24th April 1903 for a period of ten years.

Held, (1) that the suit land having been alleged in the plaint to be "old waste' and that allegation not having been traversed in the written statement, the defendants could not, under O. 8, Rr. 3 and 5, C. P. C., thereafter set up the plea that the land was not "old waste";

(2) the proviso to S 153 of the Act applied to the case and the defendants could be ejected under the provisions of that proviso;

(3) and by virtue of S. 153 read with article 19 of Part A of the Schedule to the Act, the Revenue Court had jurisdiction to try the suit; and under S. 45 of the Act, it had jurisdiction to award mesne profits.

The proviso to S. 153 of the Act was intended to add one more independent ground of ejectment.

Jampana Somadu v. *Sri Raja Venkata Ramayya.* (*Sadasiva Aiyar and Spencer, JJ.*) 248

Madras Irrigation Cess Act (VII of 1865) S. 1—*Madras Act V of* 1900—*"River belonging to Government," meaning of—Ownership of Government dependent on ownership of the bed and banks of a river—Madras Land Encroachment Act (III of* 1905). *S.* 2, *scope and effect of.*

A river having its source in hills belonging to the Government flowed through ryotwari lands, then through a Zemindari and again through a

Madras Irrigation Cess Act.—*Contd.* PAGE

Government village. A ryot of the *Zemindari* took water from the river at a place within the limits of the Zemindari for irrigating *Zemindari* lands The Government claimed to levy a cess under S 1 of the Madras Irrigation Cess Act (VII of 1865) in respect of the use of the water by the *Zemindari* ryot

Held, negativing the claim of the Government, that as the government was not the owner of the bed or the banks of the river at the place where water was taken by the *Zemindari* ryot, the river in question could not be said to be a river belonging to the Government for the purposes of Act VII of 1865.

The effect and scope of S. 2 of the Madras Land Encroachment Act (III of 1905) discussed.

Kandukuri Mahalakshmamma v. *The Secretary of State*, (1910) I. L. R. 34 M. 295=20 M. L. J. 823 dissented from.

Chinnapan Chetty v. *The Secretary of State for India* (*Abdul Rahim, Ayling, Oldfield, Sadasiva Aiyar and Coutts Trotter, JJ.*) ... F. B. 124

Madras Land Encroachment Act (III of 1905) S. 2—Scope and effect of. 124

——— **Ss. 3, 7 and 14**—*Penal Assessment—Imposition—Notice—Collection—Suit for declaration of title and that land is not liable to penal assessment—Limitation—Starting point —" Levied " in S. 14—Meaning of—Marginal notes to sections— Construction of Act.*

The word "levied in S. 14 of Madras Act III of 1905 means "collected and the period of limitation in S. 14 runs from the date when the assessment or penalty is actually collected and not when it is merely imposed.

The Secretary of State for India v. *Assan*, (1915) I. L. R. 39 M. 727=30 M. L. J. 256 referred to.

It is now well settled that marginal notes to sections of an Act of the Indian Legislature cannot be referred to for the purpose of construing the Acts.

Thakurain Balraj Kunwar v. *Rae Jagapal, Singh*, (1904) 31 I. A. 132 ; I L. R. 26 A. 393 followed.

Kesava Chetti v. *The Secretary of State for India.* (*Coutts Trotter and Kumaraswami Sastri, JJ.*) 22

Madras Local Boards Act (V of 1884) S. 95—*Local Board—Planting of trees on the sides of roads—Branches of trees overhanging private land and causing damage to owner—Suit for damages and injunction against Local Board, if maintainable.*

Under S. 95 of the Madras Local Boards Act (V of 1884) "every Local Board shall, subject to such rules as may from time to time be prescribed . . . . . . provided for . . . the planting and preservation of trees on the sides of roads and on other public places, situate within its local area.. The defendant, a Local Board, planted trees on the sides of a road within its local area. The branches of the trees spread over the plaintiff's land adjoining the road and caused damage to the crops on the land. Plaintiff brought a suit for damages and for an injunction directing the defendant, to lop off the overhanging branches of the trees. It was neither alleged nor proved that the defendant was negligent in planting the trees on the sides of the road. It was contended for the plaintiff that the defendant Local Board was liable for injury to private rights arising from its acts and omissions.

Madras Local Boards Act.—*Contd.* PAGE

Held, (1) that having regard to the provisions of S. 95 of the Madras Local Boards Act, the defendant Local Board was acting in the discharge of a statutory duty in planting the trees and was not liable for any consequential injury to private individuals in the absence of proof that the defendant was guilty of negligence in the original act of planting the trees;

(2) that the omission to remove the branches of the trees overhanging the plaintiff's land was mere non-feasance on the part of the defendant, a high way authority, for which no action would lie at the instance of a private individual ; and

(3) that the plaintiff's suit was, therefore unsustainable.

Gaekwar of Baroda v. *Gandhi Kacharbai,* (1903) I. L. R 27 B. 344. ; *Sankaravadivelu* v. *Secretary of State for India,* (1904) I. L. R. 28 M. 72 distinguished.

Geddes v. *Proprietors of Bann Reservoir,* (1878) L. R. 3. A. C. 430, 438. *Fremantle Corporation* v. *Annois,* (1902) A C. 213. *Canadian Railway Co.*; v. *Roy,* (1902) A. C. 220. *Municipality of Picton* v. *Geldert,* I. L. R. (1893) A. C. 524. *Fregellas* v. *The London County Council,* (1897) 14 T. L. R. 55. *Municipal Council of Sydney* v. *Bourke,* (1895) A. C. 433. *Aiyasami Iyer* v. *The Dictrict Board of Tanjore,* (1908) I. L. R. 31 M 117, referred to.

Krishnamurthi Aiyar v. *The Taluq Board of Mayavaram.* (*Seshagiri Aiyar and Phillips, JJ.*) 372

Madras Proprietary Estates Village Service Act (II of 1894) S. 22—

Annual rent value fixed by Tahsildar—Demand illegal—Payment under protest—Right to recover.

The annual rent value of an estate for the purposes of S. 22 of Madras Act II of 1894 was fixed not by the Revenue Officer in charge of the division but by his subordinate, the Deputy Tahsildar. There was nothing to show that the latter's calculation was adopted by the former as his own. The proprietor paid the sum demanded by the Tahsildar under protest and sued for its recovery from the Government.

Held, that the omission of the officer of Government to comply with S. 22 of Madras Act II of 1894 rendered the demand illegal and that the proprietor was therefore entitled to recover the amounts paid by him.

The Secretary of State for India v. *Raja of Ramnad.* (*Wallis, C. J. and Ayling, J.*) 436

Madras Rent Recovery Act (Madras Act VIII of 1865,) S. 11.—*Land law Madras—Rates of rent—Contracts paramount to status and usage—Contracts of implied from bare payment and acceptance of rent—Consideration for promise to pay necessary.*

Under S. 11 of the Madras Rent Recovery Act (Madras Act 8 of 1865) the rent payable by a tenant to his landlord is determined primarily by contract, which may be either express or implied Failing such contract, resort is had, when no settlement has taken place, to local usage ; but if such usage establishes a proper rent either party may require resort to the warum customary in the village for division of the crop. Failing proof of such customary warum, it is the Collector's duty to fix the rent. All these latter methods however are only applicable in cases where no contract is proved.

Madras Rent Recovery Act.—*Contd.*

The expression "implied contract in the section is an English term of art, and must be so construed: it involves the legal incident of some consideration moving from the landlord, as that incident is understood in English Law.

A number of ryots had for years paid rent at the rate of 4 fanams, which was the prevalent rate for dry lands. At various dates, having dug wells at their own expense, they took up garden cultivation, and were thereafter charged, and for years paid rent at the rate of 8 fanams prevailing for wet lands. For Fasli 1912 however they refused to accept pattahs at that rate. It was found, in view of the long continuance of payments at the 8 fanams rate, that there was an implied contract to go on paying that rate, but that there was no consideration for the new promise, the land being already held on a contract to pay 4 fanams.

Held, that the implied contract was not legally enforceable, and that the ryots were entitled to pattahs at the old (4 fanam rate)

Raja Jagaveera Rama Venkateswara v. *Alawarasa Asari* (*Lord Sumner*) ... ... P.C. 49

Madras Survey and Boundaries Act (IV of 1897) S. 11—*Boundary dispute—Order of Survey officer under S 11—Finality—Effect on rights of parties—Unsuccessful party continuing in possession after date of order—Effect.*

An order of the Survey Officer under S. 11 of the Survey and Boundaries Act of 1897 concerning a boundary dispute is, if not reviewed by the appellate authority or questioned by suit as provided in the Act, conclusive as to the rights of the parties, and none the less so because the unsuccessful party who was in possession at the date of the order was not subsequently ousted from possession.

Krishnamma v. *Achayya*, (1879) I. L R. 2 Mad. 306 Cons

Muthirulandi Poosari v. *Muthandi*, (*Wallis, C J., Ayling and Kumaraswami Sastri, JJ.*) ... ... F. B. 356

Mahomedan Law—*Gift—Validity—Property in possession of licensee—Donee enabled to take possession—Effect.*

Under the Mohomedan Law gift of immoveable property in the actual occupation of a licensee from the donor is not invalid. *Fakir Nynar Muhamed Rowther* v. *Kandaswami Kulathu Vendhan*, (1911) I. L. R. 35 M. 120 dist.

If the donee has been enabled to take possession, the fact that possession was not physically delivered would not matter.

Pathumma Umma v. *Thittu Umma*. (*Seshagiri Ayyar and Phillips, JJ.*) 159

———Heirs—Claims to shares—Tenants-in-common 184

Malabar Law—*Karnavan—Renewal of kanom before expiry of the original term—Necessity or benefit to the tarwad—Bona fide enquiries by alienee—Proof of.*

A melcharath granted by a Karnavan before the expiry of the term of the kanom will be binding on the tarwad only on proof of necessity or benefit to the tarwad.

The same principle applies to the grant of a renewal of a kanom before the expiry of the original term.

Raman Nambiar v. *Raman Nambiar*, (1914) 27 M. L. J. 175. *Cheriya Cheri Kandan* v. *Krishnan Nambiar*, (1914) 27 M. L. J. 690. *Mohideen Kutti* v. *Kunhi Koya*, (1914) 27 M L. J 691 applied.

Malabar Act.—*Contd.* PAGE

If actual necessity for the renewal is not proved, the alienee can succeed only on proof that he made such inquiries as would bring the case within the rule laid down in *Hanuman Pershad's case*, (1856) 6 M. I. A. 393. It is not enough for the alienee to show that he made enquiries of the Karnavan and was satisfied with the statements made by him as to the existence of a necessity for the renewal.

Vatavatta Nair v. *Kenath Puthen Vittil Kuppassan Menon.* (*Abdur Rahim and Seshagiri Aiyar, JJ.*) 680

———*Stanom—Alienation by stani, when binding on successor.*

The party who alleges that an alienation by the stani is valid beyond the life-time of the grantor, that is, that it is binding on his successor, ought to prove that the alienation was for the benefit of the estate or (to put it in a different way) was such as wound be binding on the other members of a joint Hindu family if made by a manager of the family.

Kozhikot Sri Manavedan v. *Zamorin of Calicut.* (*Wallis, C. J., Sadasiva Aiyar and Spencer, JJ.*)... 103

———*Tarwad—Male member of—Claim to separate maintenance—Claim to menchilavu—Maintainability—Onus of proof.*

When a male member of a Malabar tarwad leaves the tarwad house and claims separate maintenance, the onus is on him to show some good cause for doing so. The desire on the part of the male member to live with his wife is such good cause. A claim to *menchilavu* is for this purpose, on the same footing as a claim for maintenance.

Govindan Nayar v. *Kunju Nayar.* (*Old field and Seshagiri Aiyar, JJ.*)... 565

———*Tarwad—Partition—Mode of—Division* per stripes *and division* per capita—*Minor members, when entitled to re-open a partition.*

There can be no partition of the properties of a Malabar tarwad except by the consent of all the adult members. Such a partition would ordinarily be binding on the minor members as well, but if on attaining majority they are able to show that they had been prejudiced, that partition could be re-opened so far as they are concerned and they would be awarded the share which should have been set apart for them.

Where certain members of a Tarwad sued to set aside a partition of a Tarwad properties, effected during their minority, on the ground that the division ought to have been capital and not stirpital, *held* that division *per stripes* or by tavazhis, was the more approved form of partition in Malabar and that the plaintiffs were not entitled to avoid the partition on the ground set up by them.

Veluthakal Chirudevi v. *Veluthakal Tarwad Kornavan,* (1916) 31 M. L. J. 879, 881. *Yachuri Ramamurti* v. *Yachuri Ramananna,* (1916) 30 M. L. J. 308. *Sulaiman* v. *Baiyatumma,* (1916) 32 M. L. J. 137 (P. C.) relied on.

Nanikutti v. *Achutan Kutti Nair.* (*Wallis, C. J. and Spencer, J.*) ... 529

Minor—*Contract by guardian on behalf of minor and for his benefit—Personal liability of minor.*

Per *Ayling and Seshagiri Aiyar, JJ.*—No decree should be passed against a minor or his estate on a contract entered into on his behalf by a guardian, under which no charge is created on the estate, except in cases in which the minors estate would have been liable for the obligation incurred by the guardian under the personal law to which the minor is subject.

Minor Act.—*Contd.* PAGE

Per *Chief Justice.*—A decree cannot be passed against a minor or his estate on a covenant entered into on his behalf by a guardian for his benefit.

Cases on the subject reviewed.

Bathu Ramajogayya v *Vajjula Jagannadham.* (*Chief Justice, Ayling and Seshagiri Aiyar, JJ.*) 29

Mortgage—*Benamidar assignee—Right to sue on mortgage.*

An assignee mortgagee can sue upon the mortgage, even though he is a mere benamidar.

Chowdhuri Gur Narain Singh v. *Sheo Lal Singh,* (1918) 36 M. L. J. 68 followed ... ...P.C.

Vaitheeswara Iyer v. *Srinivasa Raghava Iyengar* (*Wallis C. J. Oldfield and Seshagiri Aiyar, JJ*) ... ... F.B. 289

———Usufructuary—Deed invalid for want of proper attestation—Mortgagee in possession for sometime and then deprived of possession by third parties—No collusion between them and mortgagor—Suit for mortgage money—Maintainability 286

Mortgage decree—*Recovery of balance over and above nett proceeds of sale of mortgaged property—Personal decree for balance—Whether sale must take place before passing such decree—Transfer of property Act,* 1882 (*Act IV of* 1882) S. 90.

It is not a condition precedent to the power of decreeing payment of the balance under S. 90 of the Transfer of property Act, 1882, that the mortgaged property must first be sold and found insufficient to satisfy the debt. The section is complied with when the Court passes a decree that, on the happening of the event when the nett proceeds of the sale or found to be insufficient. the balance should be paid.

Musammat Jeuna Bahu v. *Rai Parmeshwar Narayan Mahtha Ray Bahadur,* (*Lord Buckmaster*) ... ... (P.C.) 215

Mortgage of moveables—*Redemption—Right of—Contract to the contrary—Effect—Deed—Construction — Mortgage by conditional sale—Sale with covenant to reconvey.*

In the case of a mortgage of moveables the right of redemption subsists notwithstanding a contract to the contrary.

In the construction of the documents in the case, their lordships held that the transaction in question was a mortgage by conditional sale and not a sale with a covenant to reconvey.

Raghunathaiya v. *Saldanha.* (*Seshagiri Aiyar and Phillips, JJ.*) 161

Mulgeni—*Death of Mulgenidar without issue—His rights if escheat to Government or revert to mulgar.*

The rights of a mulgenidar do not escheat to the Government on the death of the last owner dying without issue but revert back to the mulgar from whom the mulgeni was acquired.

The Secretary of State for India v. *Shitaramappa.* (*Seshagiri Aiyer and Phillips, JJ.*) 207

Mulgeni tenant—*Right to improvements—Whether can be attached in execution of a decree and sold.*

The right to improvements of a mulgeni tenant in South Canara may never mature, as the lease is a permanent one; consequently such a right cannot be attached and sold in execution of a decree against the tenant.

Mulgeni Tenant Act.—*Contd.* PAGE

Anantha Bhatta v. *Anantha Bhatta.* (*Phillips and Kumaraswami Sartri, JJ.*) 92

Negotiable Instruments—*Agent's liability on a Bill of Exchange—Name of person to be charged upon a negotiable instrument must be clearly scated in such instrument as party thereto—Otherwise signatory is personally liable—Undisclosed principal cannot be made liable—Does the Indian Law differ from the English—Bills of Exchange Act*, *S.* 26 (1)—*Negotiable Instruments Act* 1881. (*Act, XXVI of* 1881) *Ss.* 23, 26, 27, 28.

The name of a person or firm to be charged upon a negotiable document must be so stated in the document itself as to make it clear on any fair interpretation thereof that he is the person liable upon it.

In an action on a bill of exchange or promissory note against a person whose name properly appears as party to the instrument it is not open either by way of claim or defence to show that the signatory was in reality acting for an undisclosed principal.

Firm of Sadasuk Janki Das v. *Sir Kishan Pershad Bahadur.* (*Lord Buckmaster*) ... ...P. C. 429

———Ss. 23, 26, 27, 28—Bills of Exchange Act, S. 26 (1)—Agent's liability on a Bill of Exchange—The fact of being agent not appearing on the instrument—Signatory liable—Undisclosed principal not liable 429

———Ss. 120 and 122—Endorsement by the payee of a hundi—Endorser disputing the validity of the hundi—Estoppel—English law. 302

Original Side Rules—*Rule* 119 — *Contempt—Committal for—Jurisdiction of court—Order disobeyed passed by Official Referee—Effect—Form of order.*

Where in a case referred to the Official Referee he made an order directing a party to produce before him certain documents alleged to be in his possession and on his failure to do so, the Court committed the party to contempt under Rule 119 of the Original Side Rules for wilful disobedience of the order, *held* that the order of commitment was perfectly within the jurisdiction of the Court. 10 B. H. C. R. 4 followed.

In view of the circumstance that it was not clear whether, at the date of the application for committal, the books ordered to be produced were in the possession of the party committed, their lordships modified the order appealed against which committed the party "until such time as he shall comply in all respects with the said orders of the Official Referee and purge himself of the said contempt by substituting for the words "until such time as he shall". the words "for a term of three months from the date of his arrest unless he shall at any time before the expiration of the said term.

Origanti Venkatarathnam v. *K. Desikachari.* (*Wallis, C.J and Napier, J.*) 461

Orissa Land Law—*Khurdah Estate—Sarbarakars—Sarbarakari jagirs—Whether they are heritable and transferable.*

Sarbarakars of the Khurdah Estate in Orissa have no heritable or transferable right in their office of Sarbarakar or in jagirs held by them as Sarbarakars. They are liable to be dismissed for misconduct, and on such dismissal lose all right to occupy the Sarbarakari jagirs. On the termination of a settlement they are bound to enter into a fresh engagement with Government (or with the grantee, when Government has made a grant), otherwise they lose their office.

Orissa Land Law—*Contd.* PAGE

In 1861 Government granted certain mouzas in Khurdah revenue free, but subject to the engagement of the then Sarbarakar (defendant's father) with themselves for the settlement period then current. On the completion of a fresh settlement in 1899 the defendant, who had succeeded his father as Sarbarakar, was called on by the grantee to execute the usual ekrarnama, but refused to do so. He set up a claim that he was a tenure-holder, and misappropriated the rents which he collected. Plaintiffs thereupon dismissed him and brought this suit to recover the Sarbarakari shakran lands in his possession :

Held, that defendant was not a tenure-holder, that his position under the grantee was the same as that of a Sarbarakar under Government, that he had been rightly dismissed, and that plaintiffs were entitled to eject him from the Sarbarakari jagirs.

Mohant Paramananda Das Goswami v. *Kripasindhu Roy* (*Sir John Edge*) ... ... (P. C.) 18

Penal Code, S. 193—*Perjury—Evidence given in Civil Court—Deposition not read over or interpreted to witness—Effect of—Criminal Procedure Code, Ss.* 239, 435 *and* 436—*Joint preliminary enquiry by magistrate, legality of—Sessions Judge directing case to be committed to Sessions, when offence not exclusively triable by his Court—Order illegal.*

It is dangerous and against public policy to convict a person for perjury on the strength of his deposition in a Civil Court when that deposition has not been interpreted and read over to him as required by O. 18, Rr. 5 and 6 of the Code of Civil Procedure.

Bogra v. *Emperor*, (1910) I. L. R. 34 M. 141=20 M. L. J. 943 referred to. *Meango* v. *Baviah*, (1917) 45 I. C. 507 not followed.

It is not competent to a Sessions Judge acting under Ss. 435 and 436 of the Criminal Precedure Code to direct a case to be committed to his court when the offence is one which is not exclusively triable by the court of Sessions.

S. 239 of the Criminal Procedure Code prohibits only a joint trial and not a joint preliminary enquiry into a case for the purpose of committal to the Sessions.

Nalluri Chenchiah In re—(*Sadasiva Aiyar and Napier, JJ.*) ... 291

———**Ss. 468, 471**—*Forgery for purpose of cheating—Using forged document as genuine—Offences of—Process server—Using false attakshi with forged signatures to defraud court—Conviction for offences under Ss.* 468 *and* 471—*Legality.*

Where a process server prepared and filed into court a false attakshi with forged signatures with a view to defraud the District Munsif into excusing his delay in returning processes and his absence from duty for a period of seven days *held* that he was rightly convicted of offences under Ss. 468 and 471 of the Penal Code.

Empress of India v. *Jiwanand*, (1882) I. L. R. 5 A. 221, *Queen Empress* v. *Girdhari Lal*, (1886) I. L. R. 8 A. 653 doubted *Kamatchinatha Pillai Inre.* (*Sadasiva Aiyar and Napier, JJ.*) 201

Practice—*High Court—Original side—Power of Judge to modify minutes before formal order is drawn up.*

A Judge sitting in the Original Side of the High Court has jurisdiction to modify the minutes of his order before the formal order is drawn up.

Practice—*Contd.* PAGE

Mahbool Bi (died) and others v. *Sherifa Bi and others.* (*Chief Justice and Napier, J*) 28

Presidency Towns Insolvency Act, Ss 55 and 56—*Transfer of property by debtor to creditor—Fraudulent preference, test of—Voluntary transfer—"Good faith" in S 55, meaning of.*

A trader in embarrassed circumstances being pressed for payment by one of his numerous creditors transferred some of his moveables to the creditor in discharge of the debts, due to him and with the balance of the sale proceeds, continued to carry on his business and to pay off other pressing claims. It was found that at the time of the transfer in question the debtor was in insolvent circumstances and had no prospect of meeting his obligations as they fell due It was not shown however that the properties were sold for less than th ir fair value or that the transferee knew that the debtor was carrying through the transfer for any purpose other than that of discharging his liability and carrying on his business. The debtor was subsequently adjudged an insolvent. On an application by the Official Assignee to declare the transfer void under S. 55 or S. 56 of the Presidency Towns Insolvency Act.

Held, that the transfer in question did not come within the scope of S. 55 or S. 56 of the Presidency Towns Insolvency Act and was valid as against the Official Assignee.

To constitute a fraudulent preference within the scope of S 56 of the Presidency Towns Insolvency Act it must be shown that the transaction in question was entered into by the debtor with the dominant and substantial view of preferring a particular creditor. The mere fact that as a result of the transaction a particular creditor was preferred to the prejudice of the other creditors is insufficient

Per *Napier, J*: A transfer cannot be said to have been made "in good faith" within the meaning of S. 55 of the Presidency Towns Insolvency Act, if it is made in fraud of the bankruptcy laws.

Ex parte *Griffith.* (1889) L. R. 23 C.H. D. 69 Ex parte *Hill.* (1883) L. R. 23 C.H. D 695 *Sharp* v. *Jackson,* (1899) A. C. 419 *Nalam Visvanathan* v. *Official Assignee of Madras* (1915) 32 I. C. 795 not followed.

The Official Assignee of Madras v. *Mehta and Sons.* (*Wallis C. J. and Napier, J*) 190

Promissory Note—Execution outside British India—No proper stamp—Admissibility in evidence—Indian Stamp Act, S. 19 ... 188

Provincial Insolvency Act, Ss. 4 (b) and 5—*Nominal transfer of property by debtor with a view to defraud creditors—Act of insolvency—'Nominal' and 'Sham' transaction, distinction between.*

A debtor who executes a nominal sale-deed of his property with a view to defraud his creditors commits an act of insolvency under S. 4 (b) of the Provincial Insolvency Act.

Per *Krishnan, J.*—The idea underlying a "nominal" transfer is to formally vest the title in one's nominee so that he may hold the property openly for himself but secretly for one's own benefit, using the document as a cloak to save it for one's own self from his creditors. For that purpose it is necessary to legally vest the title to the property in the transferee and the deed is executed with that very object.

Provincial Insolvency Act—*Contd.* PAGE

A sham transfer is one which the parties have no intention to give effect to and which does not in any way affect the property or any interest therein. The document executed is a mere nullity and of no value or effect regarding the property.

The Secretary of State for India v *Dadi Reddi Nagiah.* (*Ayling and Krishnan JJ.*) 180

——S. 16—*Adjudication—Suit by creditor under S. 53 of the Transfer of Property Act, to set aside transfer made by insolvent—Leave of the Court if essential.*

After the order of adjudication is made it is not open to a creditor of the insolvent to sue under S. 53 of the Transfer of Property Act to set aside a transfer made by the insolvent, without obtaining the leave of the court as provided by S. 16 (2) (b) of the Provincial Insolvency Act.

Vasudeva Kamath v. *Lakshminarayana Row*, (*Wallis, C. J. and Ayling J*) 453

Religious Endowments Act, (XX of 1863), Ss. 14 and 15—Scope of ... 393

Religious office—'*Paricharaka*'—*Alienation to stranger—Validity—Public policy:*

A sale of the office of Paricharaka to a stranger, where it is clear from the finding as to the duties of Paricharaka that the office is a religious one, is invalid, as the alienation of religious offices is opposed to public policy.

Rajah Varmah Valia v. *Ravi Varmah Kunhi Kutti* (1876) I. L. R. 1 Mad. 235 at p. 252 followed.

Rajam Bhattar v. *Singarammal.* (*Phillips and Kumaraswami Sastri, JJ.*) 355

Res-judicata—Boundary dispute—Order of Survey officer under S 11 of Madras Survey and Boundaries Act (IV of 1897)—Order not set aside in one year—Finality—Subsequent suit between parties ... 356

——"*Suit between the same parties*"—*Provision of Civil Procedure Code not exhaustive—Hindu femal heirs, decrees againt them—Binding on reversioners in the absence of fraud or collusion—Personal estoppel of female heir whether it prevents her from representing the estate—Code of Civil Procedure*, 1908 (*Act V of* 1908), *S.* 11.

When the estate of a deceased Hindu has vested in a female heir a decree fairly and properly obtained against her in regard to the estate is, in the absence of fraud or collusion, binding on the reversionary heir.

A Hindu lady, otherwise qualified to represent an estate in litigation, does not cease to be so qualified merely owing to personal disability or disadvantage as a litigant.

When therefore a Hindu widow sued for a declaration that she had not validly adopted a son to her deceased husband and the suit was dismissed on the ground (*inter alia*) that by her own acts she was personally estopped from denying the validity of the adoption, and on her death a person claiming as next reversioner sued the adopted son for the estate on an allegation that his adoption was invalid.

Held, that the previous decision barred such suit.

Chaudhri Risal Singh v. *Balwant Singh* (*Sir John Edge*) ... (P. C.) 527

Revenue Court. PAGE

Revenue court—Registered lease for ten years granted before Madras Act I of 1908—Suit to eject tenant on expiry of lease—jurisdiction to entertain, and award mesne profits 248

Ryotwari land—*Ownership of the soil—Right of pattadar—Claim of occupancy right by cultivating tenant—Burden of proof—Inference of occupancy right from circumstances—Length of enjoyment—Low and unvarying rent—Transfer of holdings by tenant—Effect of.*

In the case of lands held under ryotwari settlements, the presumption is that the ryotwari pattadar is the owner of the land and the burden is on his tenants claiming a permanent right of occupancy to prove it. Mere length of enjoyment in the capacity of tenants or purakudies irrespective of other circumsatnces does not raise a presumption of occupancy right. The inference as to occupancy right depends on a consideration of the whole circumstances of the case and among those circumstances are the continuance of the lands in the same hands at low and unvarying rents and the recognition by the landlord of the tenant's right to transfer the holding.

Authorities on the subject reviewed.

Held, on the evidence in the case, that the tenants had not made out their claim to occupancy rights in the suit lands situated in the Tinnevelly District.

The history of the ryotwari settlement in the Madras Presidency and in the Tinnevelly District, discussed by *Seshagiri Iyer, J.*

Ponniah Nadan v. *Deivanai Ammal.* (*Wallis C. J. and Seshagiri Aiyar J.*) 463

Small Cause Court—Jurisdiction—Suit for specific performance by the vendor of land against vendee 89

————*Order under S. 95 C. P. C.—Appeal—Maintainability.*

No appeal lies against an order passed by the Judge of a Court of Small Causes under S. 95 of the Code of Civil Procedure—*Karumaru Venkataswami* v. *Lanka Tripuriah*, (1914) 26 I. C. 389 dissented from.

Arumugam Asari v. *Gurunatha Asari.* (*Oldfield and Seshagiri Aiyar, JJ.*) 435

Specific Performance—*Suit for specific performance of a contract to pay money—Whether lies—Suit for specific performance by the vendor of land against vendee—Whether a Court of Small Causes has jurisdiction over.*

Ordinarily, a suit will not lie for specific performance of a contract to pay money. But the case of a vendor is an exception to that rule and the court will grant the vendor specific performance of the contract against the purchaser.

The nature of the averments and the form of the decree in such a case pointed out.

It would none the less be a suit for specific performance and not a suit for money as damages, if the contract between the parties stipulated for payment by the vendee first and execution of the conveyance by the vendor afterwards.

Although in a suit the prayer only asks for the payment of money, if taking the plaint averments as a whole the suit is one by the vendor of

Specific Performance—*Contd.* PAGE

land for specific performance, a Court of Small Causes will have no jurisdiction to entertain it.

Bhashyakarlu Naidu v. *Andalammal.* (*Wallis C. J. and Seshagiri Aiyar J.*) 89

Specific Relief Act, S. 42—Declaratory relief—Discretion of court—Suit for bare declaration that plaintiff is the next reversioner and not the defendant—Maintainability 169

———*S. 42, proviso—Scope of—Further relief, meanning of—Suit by a suspended trustee and archaka of a temple for declaration of the illegality of an order of suspension and for an injunction—Plaintiff not entitled to present possession of temple properties—Prayer for possession if essential—Dismissal of the suit on the pleadings if justifiable.*

A Court should not throw out a suit on the ground that it is barred by the proviso to S 42 of the Specific Relief Act unless it is quite clear that the plaintiff ought to seek further relief which he has failed to claim.

Aisa Siddika v *Bidhu Sekhar*, (1912) 17 C. L J. 30 : 93 referred to.

The further relief referred to in the proviso to the section is such relief as flows directly from the declaration sought for and such as a plaintiff would be able to claim in an ordinary suit by virtue of the title sought to be declared.

Abdulkader v. *Mahomed* (1891) I. L R. 15 Mad. 15 referred to.

Plaintiff was one of the holders of the combined office of archaka and trustee of a temple and as such entitled to the right of performing puja for 5 days once in every 9 months and to the custody of the moveables of the temple along with 19 others for a period of 6 months once in 6 or 7 years, by rotation. Owing to differences between the plaintiff and the defendants, the other archaka trustees the latter passed a resolution suspending him from his office until he paid a fine of Rs. 300. Plaintiff brought a suit alleging that as a result of this resolution he had been obstructed in the exercise of the rights and duties of his office and enjoying the emoluments and privileges attached to it and that the resolution was illegal and inoperative and praying for an injunction restraining the defendants from interfering with him in the exercise of his office. Plaintiff also claimed joint possession of the office along with the defendants. It was admitted that at the date of the suits, plaintiff was not entitled to the present possession of the temple properties. The courts below dismissed the plaintiff's suit on the ground that as he was excluded by the defendants from the office of *Dharmakartha* he ought to have sued for the possession of the temple and its properties as a consequential relief flowing from the declaration and that the suit was not maintainable without a prayer for such relief. *Held*, that the suit, as framed, was maintainable and the plaintiff was not bound to ask for possession of the temple or its properties.

Vengan Poosari v. *Chinnu* (1903) 14 M L J. 250. *Ratnasabapathi Pillai* v. *Ramaswami Iyer* (1910) I. L. R. 33 M. 452. *Ramadoss* v. *Hanmantha Rao* (1911) I. L. R. 36 M. 364 distinguished.

Sivaramalinga Dikshatar v. *Sabharathna Dikshitar.* (*Ayling and Krishnan, JJ.*) 624

Street Schemes in the city of Bombay PAGE

Street Schemes in the city of Bombay—*Bombay Improvement Trust—City of Bombay Improvement Act* 1898 (*Bombay Act IV of* 1898) *Ss.* 31, 41,42,45—*Compulsory expropriation and impropriation of owners of land adjoining streets—Whether such an owner need pay for compulsory impropriation—Street " to be formed " its meaning—City of Bombay Municipal Act* 1888 (*Bombay Act III of* 1888), *Ss.* 297, 300, 301—*Interest on unpaid price of land—When it begins to run.*

The main object of the City of Bombay Improvement Act, 1898, (Bombay Act IV of 1898), by which the Bombay Improvement Trust was constitued, was to set up with sufficient powers a street-making authority and when its function as such was expired, to have the street which had been reconstructed or made by the Trust thereupon handed back to the Corporation.

Ss. 41 and . 45 of the Act are correlative. They both refer to that ground and no other which is used as a street and for the purposes thereof. The " street to be formed " which vests in the Trust under S. 41 is identical with the formed street which revests in the Corporation under S. 45.

When therefore the "regular line of a street" was altered and the owner of adjacent land required to set forward his building on part of the old street.

Held, that the strip of old street which was never formed into the new street had never vested in the Improvement Trust ; that it remained the property of the Municipal Corporation : and that when such owner of adjacent land was ordered by the Commissioner to set forward his building upon it, it became his property in virtue of S. 301 (3) of the Municipal Act of 1888.

Held, also that as the Act makes no provision for payment by such an owner, no price was payable by him for the projection on which he was required or allowed to build.

In the case of a sale or acquisition of land, in the absence of a contract to the contrary, interest on the unpaid price runs from the date when the new owner enters into possession.

Ratanlal Choonilal Panalal v. *The Municipal Commissioner for the City of Bombay.* (*Lord Shaw*) ... ... (P. C.) 1

Suits Valuation Act, 1887 (Act VII of 1887) S.8—Valuation of suit—For purposes of jurisdiction—For purposes of court fees—How latter affects former 437

Transfer of Property Act, (IV of 1882), S 53—Decree in suits under—Form of—Civil Procedure Code, App. D. Form No 13 ... 231

———S. 53—Suit under by creditor to set aside transfer by person adjudged insolvent—Leave of Court, essential... 453

———S. 58—*Mortgage by Conditional Sale—A single transaction of a sale with a right of re-purchase before a certain date—Whether effects a mortgage by Conditional sale irrespective of the intention of the parties.*

Where in one and the same transaction, land is sold absolutely but with a right of re-purchase to be exercised before a certain date, the transaction does not necessarily become by virtue of the provisions of S. 58 of

Transfer of Property Act—*Contd.* PAGE

the Transfer of Property Act a mortgage by Conditional Sale irrespective of the intention of the parties.

Palaniappan v *Subbaraya Goundan*, I. L. W. 80 overruled.

Muthuvelv Mudaliar v. *Vythilinga Mudaliar.* (*Wallis, C. J., Oldfield and Seshagiri Aiyar JJ.*) 335

——— S. 68 cls. (b) and (c)—*Applicability—Usufructuary mortgage——Deed invalid for want of proper attestation—Mortgagee in possession for sometime and then deprived of possession by third parties—Absence of collusion between them and mortgagor—Suit for mortgage money—Maintainability.*

Where a mortgagee under a deed of usufructuary mortgage, which was not in proper form owing to want of attestation, was, after being in possession of the property for sometime, deprived thereof by third parties with whom the mortgagor was admittedly not in collusion, and thereupon sued the mortgagor for the recovery of the mortgage money, *held* that he was not entitled to do so

S. 68 cl. (b) had no application to the case because (1) the mortgagor had done no act to deprive the mortgagee of possession and (2) the default referred to in the clause was default anterior to the deprivation and there was no such defalt in the case.

S. 68 cl. (c) had also no application because the mortgagee had not, prior to suit, called upon the mortgagor to furnish other security. *Ram Narain Singh* v. *Adhindranath Mukerjee* (1916) I. L. R. 44 C. 388=32 M. L. J. 39 distinguished.

Angia Kuppier v. *Periakaruppa Kavundan.* (*Oldfield and Seshagiri Aiyar, JJ*). 268

——— S. 90—Decree under—Personal decree for balance—Sale need not take place before passing of such decree 215

——— Ss. 105, 108 (b) and (c)—Lease—Suit for possession by lessee—Premium not paid—Right to possession by lessee—Implied covenant. 313

——— Ss. 111 and 114—Principle of, if applicable to agricultural leases... 367

——— S. 123—Applicability—Gift by Hindu of immoveable property to temple 575

Trust—Public—Mosque—Evidence of user—Entries in Inam Register—Value of—Breach of trust and neglect of duty—Resumption of inam—Imposition of full assessment and grant of ryotwari pattah to defaulting trustee—Effect of—Trusts Act, S. 83 263

——— *Two trustees—Mortgage of trust property by one only—Validity—Other trustee previously consulted but wrongly refusing to join in the act—Effect.*

In a case in which there were only two trustees, *held* that the grant of a mortgage of the trust property by one of the trustees only was invalid, even where the trustee granting the mortgage had consulted his co-trustee as to the grant thereof and the latter wrongly refused to join in the act.

Savitri Antarajanam v. *Raman Nambudri*, (1900) I. L. R. 24 M. 296 referred to.

Koyittal Parambil Parkum v. *Attimana Illoth, Narayanan Nambudiri.* (*Abdur Rahim and Napier, JJ.*) 295

PAGE

Trusts of a temple

Trustees of a temple — *Suspension of hereditary archaka pending enquiry into alleged misconduct—Order of interim suspension kept in force for an unreasonably long period without enquiry being made—Interim order treated as a punitive order of suspension without notice to archaka—Order of suspension, invalid—Suit by archaka for recovery of office and for damages for wrongful suspension—Liability of temple funds.*

The Trustees of a temple suspended a hereditary archaka pendino enquiry into is alleged misconduct. The trustees however failed to make the intended enquiry for a long time and without notice to the archaka they treated the *interim* order of suspension as a punitive order to be in force till the archaka vindicated his character in a Court of law by proceeding against a certain newspaper which had published particulars of the alleged misconduct. The archaka thereoupon sued the trustees for recovery of his office and for damages for wrongful suspension from office. The defence of the trustees was that the archaka was guilty of misconduct and that the order of suspension was justifiable on the merits.

Held, (1) that having regard to the unreasonable delay on the part of the trustees in making an enquiry into the conduct of the archaka, the order of suspension, as an *interim* order, ceased to be in force long before the date of suit.

(2) that the order of suspension if treated as a punitive order, was invalid as having been passed without notice to the archaka and without giving him an opportunity to be heard in his defence, though on the merits there might be sufficient grounds for making the order,

(3) that the plaintiff was therefore entitled to a decree for recovery of his office and for damages for wrongful suspension, and

(4) that the trustees, in suspending the archaka, having acted on behalf of the temple and in what they conceived to be the best interests of the institution the plaintiff was entitled to recover the damages decreed to him from the funds of the temple.

Seshadri Aiyangar v. *Ranga Bhattar*, (1911) I. L. R. 35 M. 631=21 M. L. J. 580. *Thiruvambala Desikar* v. *Manikkavachaka Desikar*, (1915) I. L. R 40 M 177=30 M. L. J. 274. *Venkata Narayana Pillai* v. *Ponnusami Nadar*, (1917) I. L. R. 41 M. 357=33 M. L. J. 660. *Willis* v. *Sir G. Gipps*, (1846) 5 Moo. P. C. 379 referred to.

Jagannadachariar v. *Seenu Bhattachariar*. (*Phillips and Krishnan, JJ*) 361

Trusts Act, S. 88—Principle underlying—Applicability to Public trusts ... 263

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[*End of Vol. XXXVI.*]

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